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Supreme Court of the United States

OCTOBER TERM, 1967

No. 624

EX PARTE BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP

PETITIONER

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,

PETITIONER

v.

CHARLES W. BARTLETT, TRUSTEE, et al.

RESPONDENT

IN THE MATTER OF BOSTON & PROVIDENCE RAILROAD CORPORATION, DEBTOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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September 15, 1967

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Supreme Court of the United States

OCTOBER TERM, 1967

No.

EX PARTE BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,

PETITIONER,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Boston & Providence Railroad Stockholders Development Group prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit, entered on March 29, 1967, in Appeal No. 6873, *Boston & Providence Railroad Stockholders Development Group* v. *Charles W. Bartlett, Trustee, et al.*

Petitioner is tendering to this Court a separate petition for a writ of mandamus in this matter. This petition for certiorari is tendered for alternative consideration in the event that this Court shall not deem mandamus the more appropriate remedy.

The Parties

Petitioner is a group of stockholders active in the affairs of the Boston & Providence Railroad Corporation (B&P) for thirteen years. B&P is a debtor in a Section 77 proceeding in the federal district court for Massachusetts. Petitioner appealed to the Court of Appeals from a district court order approving an I.C.C. plan of reorganization for B&P.

The nominal respondent is Charles W. Bartlett, as Trustee of B&P's properties. All other parties in the district court's 1966 plan proceeding were named appellants and are now named respondents. The major respondents are Richard Joyce Smith and William J. Kirk, as Trustees of the properties of The New York, New Haven & Hartford Railroad Company, a Section 77 debtor in the federal district court for Connecticut, now operating B&P's lines on an agency account for B&P, who would purchase B&P's assets under the plan. Other respondents are the B&P (Kynett) stockholders committee, B&P itself (the debtor's corporate shell), and the United States of America.

Decisions Below

The memorandum and order of the Court of Appeals dismissing the appeal and its memorandum and order denying rehearing, respectively dated March 29 and April 18, 1967, are not reported. They are appended to the petition for a writ of mandamus. The opinion of the District Court approving the plan is reported *sub nom, In re Boston & Providence Railroad Corporation, Debtor* in 260 F. Supp. 415. The report of the Interstate Commerce Commission approving the plan is printed *sub nom. Boston & Providence Railroad Corporation Reorganization,* at 327 I.C.C. 10.

Jurisdiction

The judgment of the Court of Appeals was entered on March 29, 1967. Rehearing was denied on April 18, 1967. This Court extended the time for filing a petition for a writ of certiorari through September 15, 1967. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1254.

Question Presented

The sole question presented is set forth in the separate petition for a writ of mandamus.

Statement and Reasons for Granting the Writ

The statement of the case and reasons for granting the writ are set forth in the statement and argument of the separate petition for a writ of mandamus.

Conclusion

For the reasons set forth in the separate petition for a writ of mandamus, this petition for a writ of certiorari should be granted—if this Court shall not grant a writ of mandamus.

Respectfully submitted,

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September 15, 1967

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 661, Misc.

EX PARTE
BOSTON & PROVIDENCE
STOCKHOLDERS DEVELOPMENT GROUP,
PETITIONER.

IN THE MATTER OF BOSTON & PROVIDENCE
RAILROAD CORPORATION, DEBTOR

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1967

EX PARTE
BOSTON & PROVIDENCE
STOCKHOLDERS DEVELOPMENT GROUP,
PETITIONER.

IN THE MATTER OF BOSTON & PROVIDENCE
RAILROAD CORPORATION, DEBTOR

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

The petitioner moves the Court for leave to file the annexed petition for a writ of mandamus; and further moves that an order and rule be entered and issued directing the Honorable United States Court of Appeals for the First Circuit, and the Honorable Bailey Aldrich, Chief Judge, and the Honorable Frank M. Coffin and the Honorable Edward M. McEntee, Judges of the said Court, to show cause why a writ of mandamus should not be issued in accordance with the prayer of the annexed petition, and why the petitioner should not have such other and further relief in the premises as may be just and meet.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1967

EX PARTE
BOSTON & PROVIDENCE
STOCKHOLDERS DEVELOPMENT GROUP,
PETITIONER.

IN THE MATTER OF BOSTON & PROVIDENCE
RAILROAD CORPORATION, DEBTOR

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST DISTRICT

The Boston & Providence Railroad Stockholders Development Group prays that a writ of mandamus issue directing the United States Court of Appeals for the First Circuit to hear the petitioner's appeal, No. 6873, *Boston & Providence Railroad Stockholders Development Group* v. *Charles W. Bartlett, Trustee, et al.*

Decisions Below

The memorandum and order of the Court of Appeals dismissing petitioner's appeal, and that Court's memorandum and order denying rehearing, are not reported. They are appended hereto.

The District Court's opinion approving the I.C.C. plan of reorganization is reported at 260 F. Supp. 415. The

Commission's report approving the plan is printed at 327 I.C.C. 10.

Jurisdiction

Petitioner appealed to the Court of Appeals under 28 U.S.C. 1291. That Court's judgment dismissing the appeal was entered on March 29, 1967. Rehearing was denied on April 18.) There is no fixed time limit for a petition to this Court for a writ of mandamus. This Court's jurisdiction is invoked under 28 U.S.C. 1651(a).

Statutes

The District Court plan proceeding is governed by paragraph (e) of Section 77 of the Bankruptcy Act, 11 U.S.C. 205 (relevant portions are printed in the appendix to the brief appended hereto, p. A-3). The set-off procedure (affecting the old debentures) is provided by Section 68(a) of the Bankruptcy Act, printed *ibid.* at page A-2. The duty to file annual B&P reports as a carrier arises under Section 20 of the Interstate Commerce Act, 49 U.S.C. 20 (see portions printed *ibid.* p. A-2).

Question Presented

The sole question concerns just and provident administration of federal appeals, how far substantive justice should be suppressed to maintain judicial speed and a clear docket.

The milieu is equitable administration of a railroad by District Court A, and of the debtor railroad corporation and its owners by District Court B in another circuit. For many years the debtor and its railroad have languished in split federal court trusteeship, with no accounting.

The Interstate Commerce Commission approved a plan of reorganization requiring the debtor's stockholders to satisfy old debentures at expense to the stockholders exceeding a hundred dollars per share. The debentures have been repudiated and have never been proved as a claim against the debtor. In constructing the plan the Commission refused to pass on their validity, explaining (1) that it merely *assumed* validity, and (2) that the plan would be adjustable for the stockholders if District Court B should hold them invalid.

When its turn came to consider the plan, District Court B said that it was bound by the Commission's determination of a fair plan made according to legal standards. The court refused to pass on the validity of the debentures, but noted that the stockholders would benefit if they were held invalid.

An appeal for the stockholders denounced the debentures and attacked the plan. It also complained of District Court B's persistent refusals to *hear* proper applications for it to provide major relief through bankruptcy administration orders.

The Court of Appeals granted the appellant's motion for a nine-days extension of time to designate portions of the record for printing. But later the Court of Appeals (1) refused to accept a printed volume used by that Court for an earlier appeal on the same record—it required *reprinting;* (2) refused to allow appellant the same nine-days extension (or any extension whatever) for printing the record appendix (including the unexpected reprinting) and brief; (3) summarily dismissed the appeal for failure to meet the unextended printing deadline.

The appeal asserted that the plan would impose forfeiture on the stockholders amounting to many millions. The summary dismissal is precipitating a forced vote on the plan, and a forced sale of the debtor's railroad to the

owner of the debentures. Promoters of the plan have been assembling stock to control the vote.

In this special situation, on balancing the interests in having the First Circuit maintain judicial speed and an unburdened docket *versus* the interests in providing substantive justice and equitable judicial administration of the debtor and its estate, should this Court now direct the Court of Appeals to hear the appeal?

Statement

Petitioner is an active long-established group (the Development Group) of stockholders of the Boston & Providence Railroad Corporation (B&P).[1] Since 1938 B&P has undergone judicial administration under the equitable procedures of Section 77 of the Bankruptcy Act, 11 U.S.C. 205. In 1966 the Interstate Commerce Commission approved a plan for B&P's "reorganization" (actually liquidation) based on sale to The New York, New Haven & Hartford Railroad Company (New Haven). It certified the plan to B&P's reorganization court in Massachusetts, which approved the I.C.C. plan as made according to legal standards. The Development Group (petitioner) appealed. The Court of Appeals for the First Circuit summarily dismissed the appeal without hearing the merits.

I. Substantive Context of the Appeal

Appended hereto is a copy of petitioner's brief tendered as appellant to the Court of Appeals.[2] Its Statement of the Case (pages 5-31) describes the Development Group's fiduciary role and program (pp. 5-7). It describes B&P

[1] The group's chairman and counsel are two of B&P's six directors.

[2] Given an inability to print the entire Record Appendix for the Court of Appeals without an extension of time, the brief lacks citations to "RA" pages and was tendered in the page-proof form.

(pp. 8-10) and defines B&P's involvement with New Haven (pp. 10-21). Formerly New Haven operated B&P's lines as lessee and carrier, but in 1938 the old B&P lease was terminated by disaffirmance during New Haven's first Section 77 trusteeship in the federal court for the District of Connecticut. That court *retained* B&P's railroad properties and appointed its New Haven trustees to hold and operate them, no longer as lessee carrier, but on a *separate agency account for B&P*. (Brief, pp. 13-16.) An eroding controversy ensued over their attempt to divide the joint revenues of the New York and Boston Shore Line Route via Providence so as to allocate *all* joint earnings to their New Haven lines west of Providence and *none* to B&P.[3] But no accounting to B&P stands approved, and in 1947 they were replaced by the New Haven Company which stood in the trustees' shoes but suspended accounting to B&P altogether. Since 1947 the B&P owners have been denied any financial report or accounting statement for New Haven's continuing fiduciary operation of B&P lines for B&P—whether approved or unapproved. All accounting statements have been withheld; B&P has not received a nickel from the operation of its vital main-line railroad since 1938, and of course no rent.

By 1954 the joint undivided *net* railway operating income collected by New Haven[4] from operating their New Haven lines and B&P's lines exceeded $200,000,000. (See Brief, p. 19 based on Ex. 86.) In that year the Development Group was organized and set out to obtain divisions of the joint

---

[3] They also allocated large additional revenues and earnings to a third carrier estate in the Shore Line Route, the New York Connecting Rail Road Company owning the Hell Gate Bridge Route at the New York end, to keep that estate fully solvent throughout.

[4] The Connecticut federal court appointed the New Haven Company as successor trustee to operate the B&P lines in 1947. The role fell to the court's trustees in New Haven's second Section 77 administration in 1961. (They operate B&P still in the first New Haven reorganization proceeding, which has not yet been closed.)

rates and fares for B&P fixed according to the national fair standard of Section 15(6) of the Interstate Commerce Act. (49 U.S.C. 15(6), printed in the appendix to the appended Brief, p. A-1.) New Haven procedurally frustrated the effort in the courts, but that effort nevertheless culminated (following three Congressional hearings) in the 1958 enactment of Public Law 85-515. The Connecticut court had justified its retention of the B&P properties and business by broad interpretation of a clause in Section 77(c)(6). P.L. 85-515 provided a clarifying amendment to (c)(6) affirming B&P's right to have its divisions measured according to the national fair standard. (The amendment is printed in the appendix to the appended Brief, pp. A-2, A-3. See also Brief, pp. 14-15, 19.)

Recognizing the 1958 enactment, the New Haven Company voted by resolution of its directors to buy B&P's properties for $16,500,000, a negotiated arms' length price that would pay the B&P stockholders $300 per share. (Brief, pp. 19-21.) That became ineffectual after New Haven returned to Section 77 trusteeship in 1961 (although even in 1962 the New Haven directors affirmed the $300 basis by incorporating it into their plan of reorganization for New Haven).

In 1963 the New Haven trustees launched a campaign to sell the New Haven lines to The Pennsylvania Railroad Company for inclusion in the proposed "Penn-Central" merger. The Development Group intervened in the I.C.C.'s Penn-Central Merger proceeding and demonstrated that the New Haven trustees, although touting a New York-Boston route, actually had a main line only as far east as Providence. (Effectively controlling the dual court procedures, they can sit on B&P and keep it bottled up, but they cannot deliver it to Penn-Central.)

Hence the New Haven trustees set out to buy up the B&P quickly. Having bought a large block of B&P shares

in 1962 at $105, they offered $110 in 1963 for the remainder.[5] The drastic markdown from the $300 arms-length valuation was explained away in terms of New Haven's hard luck. The trustees asked the lawyer for the Kynett (B&P) stockholders committee to undertake to obtain 2/3 acceptance by B&P's public stockholders. They had their reorganization judge in Connecticut (Judge Anderson) condition his approval of their $110 purchase by requiring 2/3 acceptance before the I.C.C. should *begin* its hearing on fairness. The committee was able to solicit authorizations from a majority to comply with Judge Anderson's "order" so as to avoid "forfeiture".

Against this formidable barnstorming, only the Development Group had the courage to oppose the $110 price before the I.C.C. The Group opposed on two main grounds:

> *First,* that the plan valuation of $9,500,000 for B&P's properties was an unjustified markdown from the recently agreed $16,500,000—particularly in face of great new opportunities for B&P to realize large proceeds from converting surplus real estate to non-railroad uses in the tremendous urban renewal and development. (See appended Brief, pp. 23-24.)
>
> *Second,* that the plan required the B&P stockholders to kick back $4,991,000 out of the skimpy $9,500,000 sale price, on the pretext of satisfying some old debenture bonds issued for $2,170,000 (with interest since 1938)—although the debentures appeared to have no valid existence.

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[5] The remainder is a majority, 20,770 shares. New Haven controls 15,918 additional shares, making a total of 36,688 shares held outside the B&P trustee's accounts. (His sinking fund for the debentures holds 3,272 shares and his general account holds 40 shares.) Over the past 136 years only 40,000 shares have ever been issued. Rate base valuation exceeds $1,000 per share. See appended Brief, p. 10.

The New Haven trustees met the *first* objection by agreeing in *principle* to let the B&P stockholders participate in the proceeds of an intensive jointly-administered 15-year program to convert B&P's surplus real estate interests to non-railroad uses, including express highway and rail transit uses. They conceded that the $110 price did not allow for such opportunties. The program, however, would follow acquisition of the properties by New Haven.

They made no concession against the *second* objection, which is based on New Haven's contractual obligation (recognized even by New Haven's reorganization court in 1939) to provide for payment of the debentures. (See appended Brief, pp. 15, 23, 31-44, A-1, B-3, B-5, B-9.) The debentures matured in 1938. Later New Haven acquired them by satisfying the holders. New Haven's modern unwillingness to recognize that the acquisition extinguished B&P's surety obligation on the debentures (or made it cancellable by set-off) is augmented by the fact that they fell into the United States Treasury as minor added collateral for certain bank loans to New Haven which the United States guaranteed. New Haven and federal collection lawyers agreed *inter se* (without B&P) that the debentures should be deemed valid, despite (1) the failure to prove a claim on them against B&P, and (2) the New Haven court's 1939 recognition of New Haven's principal obligation to provide for their payment itself. The federal contact with the debentures has been, and is being, used against B&P. See appended Brief, pp. 29-30.

The I.C.C. 1964 hearing on the $110 plan bogged down without the proponent coalition making its case. A reopened 1965 hearing considered an amendment presented by the coalition to implement the agreed real estate participation principle. Unfortunately that sound principle is largely vitiated by the fine type. (Recognition of this comes slowly against wishful thinking, but the bid price

of B&P shares on the Boston Stock Exchange has fallen from its high of 355 in 1966 to 220 last week.[6]

The Commission approved the plan with the vitiating amendment. (See appended Brief, pp. 23-26.) It refused to pass on the debentures, leaving that question up to the District Court in Boston, which has jurisdiction over B&P's reorganization, although still lacking access to B&P's railroad properties, business, and receipts.

The Boston court also refused to pass on the debentures, saying it was bound by the Commission's approval of a plan made on legal standards. Both the court and the Commission noted that the B&P stockholders would benefit from a decision that the debentures were invalid. By misreading the plan, however, the court asserted a compromise on the debentures, saying that the plan only requires the stockholders to pay $3,500,000 on the debentures instead of $4,991,000. See appended Brief, pp. 32, 47-49. Cf. 260 F. Supp. at pp. 418, 421.

---

[6] The fine type would end the 15-year participation period in 1978. It provides for B&P properties to pass immediately to New Haven, and vests discretion in the New Haven management, although the Examiner saw New Haven's past reluctance to promote B&P real estate development as a "major impediment". See appended Brief, pp. 54-55.

The largest real estate opportunity now is to convert one of B&P's two routes north of Readville into a Southwest Boston expressway corridor. If that should produce as much as $8,000,000 ($200 per share) the fine type would put all proceeds into the treasury of the New Haven (which is formally proposing to invade its trust funds from real estate sales for use in defraying operating deficits).

New Haven would deduct its damages from the proceeds. It says its damage from the Southwest project will amount to $7,400,000. (This is on a different scale from its valuation of B&P properties as purchaser.) Such a deduction from the highway proceeds would cut the participation down from $200 to $15. (Actually less, because another clause limits the public stockholders to less than a true pro-rate share.)

Then a sort of *de minimis* clause would limit stockholders to participation in transactions producing at least $500,000 each ($12.50 per share).

See appended Brief, pp. 54-59.

Actually the plan requires the stockholders to surrender the full face amount of claim on the debentures, $4,991,000, plus interest on that amount from 1963, plus surrender of the sinking fund. See Brief, pp. 44-46.

On the side agreement between New Haven and the U. S., New Haven would pay $3,500,000 on its otherwise fully secured debt to the U. S., and would then reclaim the paper-tiger debentures. See Brief, pp. 47-49.

However, instead of being a compromise the plan requires full payment on the debentures—plus surrender of the collateral held in a sinking fund, and worth, say, $1,000,000. The total "compromise" thus considerably exceeds 100%. See Brief, pp. 44-46.

Given the plan's serious defects, the Development Group appealed to the First Circuit. See the questions presented (appended Brief, pp. 1-4).

The appeal also sought relief from the District Court's persistent refusal to hear motions to declare B&P's carrier status as required by the 1958 Act of Congress. (See Question 9 and the statutes printed in the Brief's appendix, pp. A-2, A-3.)

The appeal sought relief from the District Court's persistent refusal to hear the Development Group's petition asking the Court to hold a hearing on sale of the old main line via Forest Hills for the expressway and other public projects, and then to issue an order to provide such beneficial transfers. See Question 10 in the Brief, p. 4, and see p. 58.[7]

On September 14 the First Circuit heard oral argument on an appeal of the Commonwealth of Massachusetts over the Southwest Expressway corridor. The District Court had

[7] The difference between having the public funds go into B&P's treasury or into New Haven's treasury can be enormous. Receipt by B&P would render B&P eligible for extrication from bankruptcy, making its lack of insolvency plain.

refused to hold a hearing on the Development Group's petition for a hearing and order leading to sale of the corridor and elimination of unnecessary franchise obligations (through amendment to the plan of reorganization). In conference Judge Ford took the view that his ability to deal with that petition was impeded by the Commonwealth's absence.

Thereafter the Commonwealth asked for a declaratory judgment allowing it to take the B&P segment by eminent domain. The District Court isolated that request in a separate docket and denied the right, on strong opposition, not from the B&P owners (who did not participate) but from the New Haven trustees—again treating B&P's domain as their own. *Commonwealth of Massachusetts* v. *Bartlett*, 266 F.Supp. 390 (D.Mass. April 13, 1967.)

During this morning's argument Chief Judge Aldrich and the New Haven spoke as if the First Circuit had approved the plan of reorganization, chiding the Commonwealth for suggesting that it might be amended after more than 29 years. The Commonwealth had just called the Court's attention to our proposed amendments that were filed yesterday in the District Court, for elimination of the franchise obligations now encumbering the B&P segment and facilitating transfer to the Commonwealth. But our request that the District Court return the plan to the Commission with the proposed amendments probably faces more frustration—unless the Supreme Court will now grant this petition (or our accompanying alternative petition for a writ of certiorari).[8]

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[8] In October 1959 the District Court refused to grant a joint petition to return the Commission's 1954 plan with a proposed new plan to pay $300 per share (perhaps six times the value of the 1954 plan at that time)—although the petition was presented by all stockholder groups and was even supported by the New Haven Company itself.

II. How the Appeal Got Dismissed

Seen in context. The dismissal of the Development Group's appeal cannot be appreciated if seen only as an isolated incident to maintain judicial speed. It must be seen in context, as one more event in the 29-year procession of judicial frustrations and avoidances plaguing the venerable B&P estate and its long-suffering owners. Seen in context it becomes clear that judicial parsimony can sometimes go too far.

The district court's order approving the plan became final December 7, 1966. The presence of the United States as a party gave all parties 60 days to file a notice of appeal. F.R.C.P., Rule 73(a).

In order to get the record assembled in a workable location (which as a practical matter meant the office of the clerk of the appellate court) appellant accelerated its notice of appeal by filing on January 6, thirty days early. On February 15, the appeal was docketed in the court of appeals, although important record items (including the Commission hearings) did not come up until later.

Under court rules appellant's printed brief and record appendix became due on March 22, 1967. The brief could not be fully printed without the "RA" citations. The Record Appendix (RA) could not be fully printed by March 22. Without extension of time (duly requested) the printed documents could not be filed by March 22. So the Court of Appeals dismissed the appeal, with two decisions signed by Judge Aldrich.

No jurisdictional defect. Recently the Supreme Court has considered several cases where appellate courts have dismissed an appeal without hearing the merits. None of them has the deep consequences of this refusal, the deep frustration of substantive justice for so many persons. This case also differs from the usual procedural dismissal

in that here the appellant did not fail to perform any jurisdictional requirement.

The conflicting compensation proceeding. On January 16, 1967, the Commission opened hearings in two vital aspects of this litigation. In Washington it heard the parties on their petitions for compensation of expenses (including attorneys' fees) extending back as far as 1943. This was vital to appellant, not only to compensate counsel for work extending over 13 years, but also to reimburse members' loans and advances to the Group's B&P Development Fund, and to pay bank loans. And of course the Fund itself urgently required cash. Printing bills for more than $7,000 for the appellate court record on the 1954 plan are still to be reimbursed. Although borne largely by a cooperating attorney for another stockholder group, they indicate the problem of expense.

The B&P trustee did not oppose, but the New Haven trustees saw fit to send a seasoned trial lawyer whose incessant opposition dragged the compensation hearing into February and imposed the extraordinary necessity of briefs (contrary to the Commission's practice). Hence appellant's counsel had to submit briefs by March 20 running to 64 pages. A major subject of the briefs was the Commission's modern plan hearings, running to seven volumes—and those volumes were also the major subject of the record appendix that had to be printed in Boston by March 22. They could not reasonably be released for the appellate printer until the compensation briefs were substantially completed. Nor would the appellate court allow use of the original. Possibly New Haven counsel dragged out the compensation proceeding in order to keep appellant's counsel off the plan appeal.

The conflicting-Penn-Central-New Haven merger hearing. On January 16, the Commission opened a third conflicting hearing in New York, to set the terms for including the

New Haven and Boston & Providence railroad lines in Penn-Central's giant merger. At that hearing appellant presented a proposal to settle the B&P controversy with New Haven. The merger hearing is still going on.

Chronology of the Appeal

Given the squeeze of multiple proceedings, all in the same matter, adjustments were essential.

1. The First Circuit refused to grant a general extension of thirty days (which would only have used up the time allowed by the Federal Rules because the U. S. was a party) although it had granted such an extension in the 1957 plan appeal.

2. However, it granted an extension of nine days to file designations of the record for printing.

3. The First Circuit still insists on letterpress printing, and appellant engaged the Court's printer, who expressed the opinion that the first volume of the old plan appeal record could be used, (based on experience with the court's usage in other cases, especially the Northeast Airlines litigation). Appellant's counsel still held the copies reserved for the Supreme Court in 1957 (before the 1958 Act of Congress). But the major items for printing, the seven I.C.C. hearing volumes, could not be released to the printer until the compensation briefing was done. The printer named Monday, April 3, as his earliest deadline. At the suggestion of the Deputy Clerk, a motion for extension was revised to March 31, Friday—to allow time for briefs of appellees without putting the case over onto the June calendar. The Deputy Clerk confirmed usage of record volumes from earlier appeals as an occasional practice of the court.

4. On March 24 the court forbade using the old record

volume in this case and required reprinting. It refused to grant any extension of time for printing.

5. The printer then told the Clerk that the reprinting would make it impossible for him to meet the March 31 date, in view of other court commitments.

6. The Court of Appeals dismissed the appeal by memorandum of March 29, and denied rehearing with memorandum of April 18. Both memoranda are appended.

7. Throughout all this the Court denied appellant's requests for an oral hearing.

Reasons for Granting the Writ

1. Petitioner has incurred no jurisdictional defect. The denial of justice on the merits comes solely as a matter of the appellate court's abusive discretion.

2. The denial facilitates manipulation of the Section 77 proceedings to force on B&P and its beleaguered stockholders judicial confiscation for the benefit of their own operating fiduciary, the New Haven, which occupies their properties exclusively, has withheld all earnings from their business since 1938 and gives no accounting whatever.

3. Consider the debentures. They are worthless paper, by all legal standards. (The strongest argument made on the other side is that the B&P trustee has been so lax in not denouncing them as to estop the B&P stockholders.) They bear a clear legend of issuance under the old lease contract, which requires the former lessee (New Haven) to provide for payment of the principal and to pay the interest currently. B&P proved its claim therefor in New Haven's bankruptcy court in 1939. Later New Haven paid the debentures (and obtained important managerial benefit by doing so). Yet B&P's bankruptcy court *refuses to hear* our pending motion to reject New Haven's claim against B&P on the debentures. The Commission refuses

to pass on the question and relies on the court to do so in considering the plan. But the court, when it considers the plan, says that it is bound by the Commission.

This becomes a sort of shell game.

To show a compromise the court misrepresents the treatment of the debentures in a way that the S.E.C. would bar anyone from doing (other than a judge) in the decision that is to be the balloting information for voters. It says that the stockholders are only required to surrender $3,500,000 to satisfy the debentures—although the plan actually levies the full principal and interest against them plus a bonus of the sinking fund. Thus, the plan forces the B&P owners to surrender back to New Haven (or to New Haven's pledgee for New Haven's benefit) (a) $2,170,000 principal, *Plus* (b) interest of 130% or $2,821,000 through 1963, *plus* (c) interest at $224,595 per year (more than 10% of the principal) after 1963, *plus* (d) the entire sinking fund, worth, say, 50% as a bonus. The court calls it a compromise which, having been approved by the Commission, is therefore automatically valid. But the Commission approved *only* in the event that the debentures are valid, which the court won't say. The court of appeals refuses to pass on the matter and proceeds to cut off the stockholders from any adjudication. Hence the Commission has now had the decisions printed up in the balloting prospectus. On July 31 the Commission refused to postpone the vote for Supreme Court review.

3. The debentures manipulation more than warrants this Court's stepping in and directing the Court of Appeals to hear the appeal. An additional element is the New Haven's fiduciary breach, buying the debentures at a large discount and then levying against its managed B&P estate for the full amount including profit.

4. Consider the real estate participation. The District Court found that an indenture of equitable charge provides

fair protection for the stockholders. The indenture was not offered in evidence, and it has never been approved by the New Haven. Actually it is unworkable and will frustrate the B&P stockholders and the public interest of the Commonwealth of Massachusetts and the City of Boston as demonstrated by the New Haven's opposition to the Commonwealth over the Southwest Expressway in the Court of Appeals this morning.

5. The memoranda of the Court of Appeals say no word about what is fair to the stockholders. They impute some sort of dereliction to counsel for the appellant. Yet surely the dereliction is on the other side. The appended Brief shows which side is the true fiduciary.

6. The appellate court emphasizes a latter-day interest of haste, and the importance of not running a risk that *appellees* might delay the argument from May until June by needing an extension of time (which the Court apparently would have granted). Therefore appellant may *not* have any extension.

7. The court charges counsel with a duty to engage more counsel. But that only goes to mould the legal profession into a trust of the big firms. Counsel was indeed forced by the pressures to engage a Boston firm to help on the compensation. That was unexpectedly arduous; the firm was not available for the appeal. With all admiration for the established big firms, creative solutions and the maintenance of democracy in this land still require dedicated individual practitioners. It will be a sorry day when they are driven to the litigative fringe.

8. What is all this interest in speed at the expense of justice? It is well said that "Delusive interests of haste should not be permitted to obscure substantial requirements of orderly procedure". *Duke Power Co.* v. *Greenwood Co.*, 299 U.S. 259, 268. "In any event, mere speed is not a test of justice. Deliberate speed is. Deliberate

speed takes time. But it is time well spent." Frankfurter, J. in *First Iowa Coop.* v. *Power Commission,* 328 U.S. 152, 188 (1945) (dissenting opinion). It has even been said that "Speed and hurry ought to be antipodes of judicial behavior." Learned Hand, J., in *California Apparel Creators* v. *Wieder of Calif.,* 162 F.2d 892, 903 (2 Cir. 1947).

Finally

This is the second B&P plan to reach the court of appeals. The refusal of the courts to grant relief from the confiscatory plan of 1954 was disillusioning, but Congress came to the rescue in 1958, which led to the $300 basis of 1959. That fell apart after New Haven failed in 1961. Now the B&P owners have a last opportunity to realize something approaching fairness by converting their properties to new uses.

When the first appeal was coming on in 1957, the former chief justice was informed of its imminence. He expressed himself to one of the undersigned counsel in unforgetable repugnance over the prospect of having to grapple with the B&P tangle. He said that he had told the district judge to get it off the docket.

It may be repugnant to hear it, but it is more repugnant not to hear it. With the debentures finally exorcised, B&P will be in a position to work out its destiny. After all B&P's stock did reach $355 last year, before the defects in the plan were appreciated. The values are there. B&P's whole "insolvency" is abusive.

Conclusion

This petition shows that relief is not obtainable in the other courts or by the normal appellate process. The Court of Appeals has departed from this Court's modern standards of judicial providence so far that supervisory intervention is required.

Petitioner is not asking this Court to review on the merits, but only to issue a simple *per curian* order to hear the appeal.

Respectfully submitted,

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Attorneys for petitioner

September 14, 1967

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6873.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS' DEVELOPMENT GROUP,
Appellant,

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
Appellees.

[In the Matter of Boston and Providence Railroad Corporation of Boston.]

MEMORANDUM and ORDER

MARCH 29, 1967

PER CURIAM. The court has considered appellant's motion for reconsideration, appellees' second motion to dismiss, and appellant's memorandum in opposition thereto. In the last mentioned, appellant's counsel states that he was "led to believe" certain things. Careful inquiry of our clerk's office discloses that he was not led to believe any of the stated matters by that office. He was not led to believe them by the court. We cannot understand how, when appellant by order of court was denied a motion for ex-

tension for a month, he should have assumed that a motion to extend for a week would be granted simply by asking for it, let alone that he could ask for it the last day, too late for him to do anything if we denied it. Nor do we understand how he could think, having filed a designation of what he proposed to print, that he could, on said last day, expect that he could be allowed not to print various designated matters, or even furnish copies to the court or counsel.

Finally, we do not understand how counsel thought by asking this further extension, and shortening appellees' time, that he was not, as he puts it, "cramping appellees," particularly having in mind counsel's own characterization that "This is no ordinary appeal." We also note that the printer has informed us this morning that the record cannot be printed even on the date to which extension is now asked. Had counsel diligently conferred with appellees and made arrangements with them, or, had he conferred with our clerk and learned our customary procedure for ordering temporary copies to appellees so that they would not be cramped, we might be more receptive to his present assertion of concern.

Counsel had been fully warned by appellees' prior motion to dismiss that in their view time was of great importance in this case. Our own action had indicated that we agreed. The order of the District Court approving the Plan of Reorganization was entered on November 21, 1966. Appellant's subsequent motion was denied on December 7, 1966. We do not think that the fact that appellant chooses to employ counsel "without an office staff," or, apparently, other associates to whom he entrusts any work, should entitle him to set his own time schedule, break his own express commitment as to printing, and limit his consideration of our rules and procedure to making inquiry, it would seem, of his printer, and expect us to reverse our stand that in a case of this importance appellees, too, were entitled to

consideration. We decline to reverse our action on the motion to extend time, and we allow appellees' second motion.

Order. The appeal is dismissed for want of diligent prosecution.

By the Court:

(s) ROGER A. STINCHFIELD
Clerk.

Enter:

(s) ALDRICH, CHJ.

[cc: Messrs. Rood, Hollander, Meserve, Garfield, Channing and Mulcahy.]

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6873.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Appellant,

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
Appellees.

[In the Matter of Boston and Providence Railroad Corporation of Boston.]

MEMORANDUM and ORDER

APRIL 18, 1967

PER CURIAM. In connection with petitioner's request for rehearing reference is first made to our memorandum and order of March 29, 1967, much of the contents of which remains pertinent to, and is incorporated in, this memorandum. The relevant portions of petitioner's request may be summarized as follows:

1. Petitioner charges the court with not considering the merits. This, of course, is true. The reason the case was dismissed was because petitioner had not exercised reasonable diligence in presenting the merits.

2. Petitioner says that it is unfair to penalize it for the dereliction of its counsel. Our answer to this is that if someone must suffer because of dereliction of counsel it is more appropriate that it be his own client than the other side. This seems particularly so when it appears that the other side was vigorously objecting to postponement[1] and counsel for petitioner was using the delay, and perhaps capitalizing on it, to seek a settlement.

3. With respect to petitioner's asserted realization that he could not expect an extension which would postpone the time for argument, we must repeat that this was the necessary effect of what he did ask. Amplifying what we said before, had he made specific inquiry of the clerk,s office he would have been told that an appellee's brief is due under the rules the Friday, plus a week, before the opening of the sitting. This is to permit time for a reply brief, so that request for permission to file such a brief after the argument will be avoided. Hence the extension which petitioner requested would not have allowed the "one month" that it continues to talk about, but the rule's absolute minimum of three weeks. We have read the tendered galley of the brief which petitioner now wishes to file. It is incomprehensible that petitioner could have thought it fair, or even possible, that some 60 pages of assertion of broad and extensive mistakes of conduct, discretion, and [page two of original memo] law, could have been answered in three weeks.[2] Furthermore, we note that petitioner makes no reply to the statement in our previous memorandum that petitioner's printer informed us it could

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[1] It should not be forgotten that appellees had moved to dismiss once before, and we had supported petitioner. (March 2, 1967).

[2] Petitioner's proposed brief complains of a large number of alleged improprieties commencing in 1936 and continuing almost uninterruptedly for thirty years. What date is selected for the commencement of its legal complaints is not clear.

not possibly meet even the new date to which extension was sought.

In a reorganization proceeding, where pressing and important matters are involved, as appellees had fully brought to petitioner's attention, for an order of confirmation entered in November not to be reached until June is extraordinarily undesirable. For the reasons presently and hitherto given, we will not allow it.

Order. The petition is denied.

By the Court:

(s) Roger A. Stinchfield
Clerk.

Enter:

(s) Aldrich, Ch. J.

[cc. Messrs. Rood, Hollander, Meserve, Garfield, Channing and Mulcahy.]

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 661, MISC.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, ET. AL.,
Respondents.

BRIEF OF RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS AND TO PETITION FOR A WRIT OF MANDAMUS

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October 11, 1967

PRESS OF GEORGE H. DEAN CO., BOSTON

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Supreme Court of the United States

OCTOBER TERM, 1967

No. 661, MISC.

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UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, ET. AL.,
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BRIEF OF RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, IN OPPOSITION TO MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS AND TO PETITION FOR A WRIT OF MANDAMUS

QUESTION PRESENTED

In dismissing petitioner's appeal "for want of diligent prosecution," did the United States Court of Appeals for for the First Circuit abuse its discretion and depart from sound judicial conduct so as to warrant the Supreme Court in issuing the extraordinary writ of mandamus?

STATEMENT OF THE CASE

The proceeding at bar grows out of the reorganization of the Boston and Providence Railroad Corporation (B&P) under Section 77 of the Bankruptcy Act.

The B&P has been in reorganization in the United States District Court for the District of Massachusetts since 1938 — 29 years.

On March 11, 1966, a Plan of Reorganization was approved by the Interstate Commerce Commission (327 I.C.C. 10) and, as shown in the Reorganization Court's docket, was certified to the United States District Court for the District of Massachusetts on June 3, 1966.*

In its Report approving the plan, the Commission noted that the "Development Group represents the views of only two minority stockholders, rather than all original members of the Group. . . ." (327 I.C.C. 10, at 12).

On November 8, 1966, following a hearing on objections to the plan, the district court rendered an opinion approving the plan in all respects and providing for classification of creditors and stockholders (260 F. Supp. 415). It noted that petitioner was the only objector to the plan and concluded that the plan "represents a solution which all interested parties, except a minuscule dissident minority, are willing to accept as fair and reasonable." (260 F. Supp. 415, at 423). Decrees were entered on November 21, 1966.

On December 1, 1966, petitioner filed a motion for a new trial and other relief. On December 7, the district court denied this motion.

On January 6, 1967, petitioner filed a notice of appeal from the order approving the plan and from the denial of its motion for a new trial.

---

*Petitioner's successful attempts to frustrate a plan which had been approved in 1954 (see 327 I.C.C. 10, at 11) are set out in Appendix A.

On February 15, 1967, the Clerk of the Court of Appeals notified all parties that petitioner's designation regarding printing and statement of points to be relied upon would have to be filed by February 23, and its brief and record appendix by March 22. On February 18, petitioner moved for a thirty day extension for all of these matters; on February 23, the three appellees (the B&P Debtor, the Stockholders' Committee and the New Haven Trustees) filed a memorandum in opposition to the motion. On February 24, the Court denied petitioner's motion for extension.

On February 27, appellant having failed to make the February 23d filings, the three appellees moved for dismissal of the appeal or affirmance of the lower court's judgment. This motion objected to postponement and highlighted petitioner's failure to comply with the Clerk's notice.

On March 1, petitioner filed a memorandum opposing the motion for dismissal or affirmance, and moved for an extension of time until March 10 to designate additional parts of the record. On March 2, the Court of Appeals denied appellees' motion for dismissal or affirmance and gave the petitioner until March 10 to designate supplemental parts of the record. On March 10, petitioner filed a supplemental statement of some parts of the record to be printed, stating that the "remaining designations will be furnished as soon as possible."

On March 21, the day before the brief was due, petitioner filed another motion to permit the use of the record on an earlier appeal instead of printing portions of the record and to extend the time for filing its brief and record appendix until March 31.

On March 23, the appellees filed a second motion for dismissal or affirmance again calling attention to the urgency of the matter and the need for expedition and stating that petitioner had been twice warned of the necessity for filing its brief and record appendix on March 22, that for the sec-

ond time within a month petitioner had waited until it was actually in default under the Court's Rules and Orders before seeking an extension of time, and that on the very day when its brief was due, petitioner had served upon appellees another motion to extend the time for such filing and to be relieved of its prior agreement to print parts of the record.

On March 24, the court denied the motion relative to printing and extension of time.

On March 28, petitioner filed a motion for reconsideration of such denial, repeated its request for an extension of time and filed a memorandum in opposition to appellees' second motion for dismissal or affirmance.

On March 29, the court entered its "Memorandum and Order" stating that it had considered appellant's motion for reconsideration of the denial of its motion for enlargement of time, appellees' second motion to dismiss and appellant's memorandum in opposition thereto. The reasons given for such opposition were enumerated in the Court's Memorandum and were expressly held to be inadequate. The appeal was thereupon "dismissed for want of diligent prosecution".

On April 12, petitioner filed for rehearing and, two days later, without consent of the Court, filed incomplete galley proofs of its brief.

On April 18, 1967 the Court entered a second "Memorandum and Order" in which it discussed fully the allegations contained in the petition for rehearing and brief and denied the petition. The April 18th Memorandum, on April 25th, became the Mandate to the District Court.

ARGUMENT

The Court of Appeals properly dismissed petitioner's appeal for want of diligent prosecution. To do otherwise would have countenanced petitioner's then latest attempt to delay the reorganization by abuse of legal process.

Notwithstanding its sonorous title, petitioner represents a "minuscule dissident minority" (260 F. Supp. 415, 423), which for some 13 years has steadfastly opposed all responsible attempts to conclude the most protracted railroad reorganization proceeding since the enactment of Section 77 of the Bankruptcy Act.

Except for a small and apparently shifting minority,[1] petitioner does not act on behalf of the public stockholders of the Boston and Providence Railroad Corporation (B&P), who support the plan which petitioner seeks to undermine. Its acts are those of a few individuals who, by refusing any compromise, are willing to gamble recklessly on the destruction of the public stockholders' equity, and to risk frustration of the public interest in continued rail operations, in the dim prospect of an all-or-nothing financial victory.

Since its formation, petitioner has resorted continuously to the devices of obstruction and delay (See Appendix A). Its present efforts are directed to the prevention of confirmation of the plan within 18 months after the Commission's certification. This would lay the groundwork for a further effort to resubmit the plan to the Commission under 11 U.S.C. 208.[2]

Sound judicial administration requires the prosecution of appeals with dispatch and orderliness. The prevailing

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[1] In its last Report, the Commission could find that the Development Group's objections were subscribed to by only two of its members (327 I.C.C. 10, at 12). The Reorganization Court found at least one, and, even accepting petitioner's claim, at most, five or six shareholders (260 F. Supp. 415, at 419).

[2] Petitioner has already so petitioned the District Court for the District of Massachusetts, although prematurely, by petition dated September 12, 1967. The petition was denied on September 19, 1967, and a motion for reconsideration was filed on September 29.

parties in the lower court are entitled to a prompt determination of any appeal; this is especially the case in a railroad reorganization where the public interest as well as private rights are involved. Unlike dismissal of a complaint in a *nisi prius* court, petitioner has already been heard fully on the merits before the Commission and the Reorganization Court and its claims found meritless. Further, dismissal of the appeal does not foreclose any right, since the all-important vote of creditors and stockholders, in the process of being taken, will determine what views the parties with the substantial interests at stake hold of the plan. Subsequent to the vote, a full hearing on the merits will be had in the Reorganization Court to determine whether the plan should be confirmed.

In view of the fact that the interests of all other parties were being jeopardized by delay, as they had been in 1954, the Court of Appeals properly refused to permit petitioner to press his appeal at his own calculated leisurely pace and in utter disregard of the court's rules and orders.[3] The court merely imposed upon petitioner the rules of appellate practice required of all litigants. In fact, over objections, it granted petitioner one extension for furnishing a supplemental designation of the record and denied appellees' first motion for dismissal or affirmance. The recitations of facts contained in the First Circuit's memoranda of March 29 and April 18, 1967 demonstrate fully and objectively the unreasonableness of the demands which petitioner was making.

Petitioner's strategy of delay has already frustrated one plan of reorganization for this Debtor (See Appendix A) and was known to the Court of Appeals (*Freeman* v.

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[3] Petitioner's proclivity for tailor-making its own rules persists in this Court. Thus, its petition for certiorari (No. 624) does not even pretend to set forth any basis for the granting of the writ, but merely refers to its petition for mandamus (No. 661, Misc.), which petitioner had filed with the Clerk of this Court one day prior to the filing of the petition for certiorari.

Mulcahy, 250 F.2d 463, 470-71 (1st Cir. 1957)). The First Circuit properly refused to sanction further steps directed to that end.

Under the attendant circumstances, this Court should not sustain the motion for leave to file a petition for writ of mandamus. In the words of this Court's Rule 30: "The issuance by the court of any writ authorized by 28 U.S.C. §1651 (a) is not a matter of right but of sound discretion sparingly exercised."

Petitioner had an adequate remedy by certiorari to review the narrow question of whether the Court of Appeals had properly dismissed its appeal. After obtaining two extensions of time to file its petition for a writ of certiorari, petitioner stated no grounds for the grant, and in this mandamus proceeding, states no reasons why the ordinary remedy of review by certiorari is inadequate. In this proceeding, petitioner has appended a brief on the merits (never properly filed in the Court of Appeals) which it could not have annexed or appended in the certiorari proceeding under S. Ct. Rule 23.3. The brief should be disregarded.

CONCLUSION

For the foregoing reasons, the Trustees of the property of The New York, New Haven and Hartford Railroad Company urge that the motion for leave to file a petition for a writ of mandamus be denied and that no writ issue.

Respectfully submitted,

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October 11, 1967

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding by depositing in the United States Post Office at Boston, Massachusets, with first-class postage prepaid, a copy thereof properly addressed to counsel of record for each of the said parties at his post office address.

Dated at Boston, Massachusetts, this 11th day of October, 1967.

JAMES GARFIELD
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APPENDIX A

DILATORY TACTICS OF THE BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP

In its opinion of December 9, 1957, affirming Judge Ford's approval of the 1954 plan, the Court of Appeals made the following comments on the events following the Commission's approval of the plan (*Freeman* v. *Mulcahy,* 250 F. 2d 463, 470-471):

"No petitions for modification of this plan were filed until March 8, 1954, when the appellants, Barton et al., giving themselves the somewhat sonorous title of The Boston & Providence Railroad Stockholders Development Group, appeared on the scene with a petition for leave to intervene coupled with a petition for modification of the plan. The Commission accorded the Group recognition and thereafter it has taken a very active part in these proceedings. It filed numerous motions and petitions during the spring and summer of 1954, all of which the Commission denied except one asking leave for all parties to file briefs on the significance in this proceeding of the decision of the Supreme Court in *St. Joe Paper Co.* v. *Atlantic Coast Line R.R.*, 347 U. S. 298, handed down on April 5, 1954. The Group also brought a suit in the United States District Court for the Eastern District of Virginia, Alexandria Division, against the Commission and the United States, in which New Haven intervened, for the purpose of compelling the Commission to establish divisions of joint freight rates between B&P and New Haven. In that suit the Group was unsuccessful on the ground that the matter had already been thoroughly canvassed by the Commission and the Court of Appeals for the Second Circuit. See *Group etc.* v. *Interstate Commerce Commission,* 133 F. Supp. 488 (1955), affirmed,

350 U. S. 926 (1956), rehearing and reconsideration as to costs[7] denied. 350 U. S. 985 (1956).

"Eventually, on July 30, 1954, the Commission filed a fifth supplemental report wherein, we think quite properly, it held the rule of the *St. Joe Paper Company* case inapplicable, and wherein it also, after reconsidering the evidence in detail, affirmed its prior conclusions with respect to the price to be paid by New Haven for the B&P properties."

The proceedings referred to included those hereinafter listed, all of them initiated by the "Development Group." They resulted in a delay of two years before the District Court could act on the plan. (See 143 F. Supp. 866, 868)

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1954			
Mar. 8	I.C.C.	Petition of intervention	Granted
Mar. 8	I.C.C.	Petition for modification of order of Jan. 5, 1954	Denied, July 30, 1954 —290 I.C.C. 404, 414
Mar. 18	I.C.C.	Complainant seeking divisions between B&P and NH (Docket 31489)	Dismissed, July 13, 1954 — see 290 I.C.C. 404, 405
Apr. 12	I.C.C.	Motion to file briefs on effect of *St. Joe* case on Jan. 5, 1954 plan	Motion granted Apr. 16, 1954, but *St. Joe* case found inapplicable — 290 I.C.C. 404-409
Apr. 26	I.C.C.	Petition to intervene in Finance Docket 18347 for trackage rights over NH	Denied, July 7, 1954

"[7] The Virginia Court, being of the opinion that the Development Group's action was 'oppressive and vexatious,' had ruled that New Haven was entitled to an attorney's fee of $1,500 as well as to its statutory costs."

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
June 8	I.C.C.	Motion to suspend proceedings in Finance Docket 12131 pending disposition of Docket 31489	Denied, July 30, 1954 — 290 I.C.C. 404, 405
Aug. 26	I.C.C.	Petition to reconsider denial of June 8th motion	Denied, Nov. 15, 1954
Aug. 26	I.C.C.	Motion to advise Court in Mass. that B&P reorganization proceeding should be suspended until determination of issues in Docket 31489	Denied, Nov. 15, 1954
Sept. 13	I.C.C.	Petition to reconsider denial of April 26th petition in Finance Docket 18347	Denied, Oct. 18, 1954
Oct. 25	U.S.D.C. E.D.Va.	Bill of complaint to set aside I.C.C.'s refusal to grant the relief sought in I.C.C. Docket 31489 and to direct I.C.C. to establish divisions	Dismissed, Mar. 31, 1955—133 Fed. Supp. 488
1955			
Apr. 11	U.S.D.C. E.D.Va.	Motion for new trial and reconsideration	Denied, May 6, 1955
Apr. 29	U.S.D.C. E.D.Va.	Motion for postponement of Apr. 11th motion	Denied, May 6, 1955
May 18	U.S.D.C. Mass.	Petition to instruct B&P Trustee to intervene in Va. case	Granted, June 16, 1955 (though Va. complaint had already been dismissed)
June 22	U.S.D.C. Va.	Motion to supplement complaint	Denied, July 1, 1955
June 22	U.S.D.C. Va.	Motion to amend Court's opinion	Denied, July 1, 1955

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
June 22	U.S.D.C. Va.	Motion to amend Court's order of June 15, 1955, taxing costs to complainant	Denied, July 1, 1955
June 27	U.S.D.C. Va.	Motion for reconsideration of motion of April 11th	Denied, July 1, 1955
June 27	U.S.D.C. Va.	Motion for ex parte ruling on preceding motion or order shortening time	Denied, July 1, 1955
June 27	U.S.D.C. Va.	Motion for ex parte order to U.S. and I.C.C. to show cause why their responses to B&P Trustee's motion to intervene should not be stricken	Denied, July 1, 1955
July 5	U.S.D.C. Va.	Notice of appeal to U.S. Supreme Court from orders of Mar. 31st, May 6th, June 15th and July 1st	Appeals all denied, Jan. 9, 1956—350 U.S. 926
Aug. 29	U.S.D.C. Mass.	Motion to instruct B&P Trustee to join in appeals to U.S. Supreme Court	Denied, Aug. 29, 1955
1956			
After Jan. 9	U.S.Sup. Ct.	Petition for rehearing of appeals	Denied, Mar. 12, 1956 —350 U.S. 985
After Jan. 9	U.S.Sup. Ct.	Motion to clarify Supreme Court's order of Jan. 9, 1956	Denied, Mar. 12, 1956 — 350 U.S. 985
After Jan. 9	U.S.Sup. Ct.	Petition for reconsideration of dismissal of appeal from order taxing costs	Denied, Mar. 12, 1956 — 350 U.S. 985
May 11	U.S.D.C. Mass.	Motion to postpone hearing on plan or refer it back to Commission	Denied, July 24, 1956

Hearings on the plan were held before the District Court on May 15 and 16, 1956. Judge Ford handed down an opinion indicating approval of the plan on July 24, 1956, and entered a decree approving it on September 11, 1956.

Appeals were taken by the Development Group and two other parties, but only the Development Group took the following actions:

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1956 Sept. 21	U.S.D.C. Mass.	Motions: (1) to amend findings and conclusions in opinion of July 24, 1956, approving plan, (2) for new trial, (3) for rehearing, (4) to amend decree of Sept. 11, 1956	Denied, Oct. 24, 1956
Oct. 10	U.S.D.C. Mass.	Letter to Judge Ford asking rehearing and proposing "Findings and Conclusions" (76 pages)	Denied, Oct. 24, 1956
Oct. 22	U.S.D.C. Mass.	"Offer of Proof"	
Nov. 23	U.S.D.C. Mass.	Notice of appeal from Order of Oct. 24, 1956	
1957 Jan. 15	U.S.D.C. Mass.	Motion to refer plan back to Commission	

The Court of Appeals on December 9, 1957, affirmed Judge Ford's decision approving the plan. Again only the Development Group took the following actions:

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1957 Dec. 24	U.S.Ct. of App.	Motion to enlarge time for filing petition for rehearing	Denied, Dec. 30, 1957

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1958			
Mar.	U.S.Sup. Ct.	Petition for certiorari	Denied, Apr. 28, 1958 — 356 U.S. 939
Apr. 23	U.S.Sup. Ct.	Motion for leave to file petition for rehearing of appeal from Va. Court	Denied, Apr. 28, 1958 — 356 U.S. 948
Apr.	U.S.Sup. Ct.	Petition for rehearing	Denied, June 9, 1958 — 357 U.S. 915
May 29	U.S.Sup. Ct.	Motion to extend time for petition for rehearing or to defer consideration and petition for rehearing of order of Apr. 28, 1958	
July 19	U.S.D.C. Mass.	Petition under 11 U.S.C. § 208(a)(1)	Referred to I.C.C. July 22, 1958—see 312 I.C.C. 120, 121
Sept.		"Corrected" motion under § 208	
Oct. 31	I.C.C.	Supplemental petition under § 208(a)(1)	See 312 I.C.C. 120, 121
1959			
Oct. 15	U.S.D.C. Mass.	Second Supplemental petition under § 208 (a)(2)	Referred to I.C.C. — 312 I.C.C. 120, 121

On March 7, 1960, the Commission issued its Sixth Supplemental Report recalling the plan under §208 (312 I.C.C. 120). A hearing was held on July 13, 1960, at which the New Haven informed the Commission's Examiner that its financial condition had become so precarious that it could no longer afford to purchase the Boston & Providence properties for cash or for new securities. The hearing was thereupon adjourned *sine die*. On July 7, 1961 the New Haven again went into reorganization under Section 77.

In November 1963, a modified plan of reorganization was filed by the Boston and Providence Railroad Stockholders'

Committee with the approval of the New Haven Trustees and the New Haven Reorganization Court. Hearings on that plan were held before an Interstate Commerce Commission Examiner in April and May, 1964, and on amendments, similarly proposed and agreed to, on March 9 and 10, 1965. The amended plan was approved by the Commission in March, 1966 and by the United States District Court in November, 1966, and is the plan now pending.

During and after that period the Development Group continued to interpose obstacles and create delay as shown in the following:

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
1960			
Oct. 17	I.C.C.	Request to file "Plan B"	Denied, Dec. 20, 1960
1964			
Jan. 23	I.C.C.	Motion to extend time for answers to Stockholders' Committee petition for hearing on modified plan	
Feb. 26	I.C.C.	Motion that hearings be postponed until after filing of joint report in Penn-Central merger case	Denied
Mar. 2	U.S.D.C. Conn.	Motion to intervene in NH reorganization proceeding and to participate as amicus curiae	Denied, Mar. 2, 1964
Mar. 20	U.S.D.C. Conn.	Notice of appeal	Appeal dismissed, by U.S. Ct. of App. 2d Cir., June 8, 1964, with costs and counsel fees
May 1	I.C.C. Examiner	Motion to adjourn hearings to June 2, 1964 (Rec. 2208)	Denied, May 1, 1964 — Rec. 2223

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
May 18	U.S.Ct. of App. 2d Cir.	Motion for extension of time for filing record on appeal	Denied, June 9, 1964
June 1	U.S.Ct. of App. 2d Cir.	Motion for "summary reversal" of District Court's order of Mar. 2, 1964	Denied, June 9, 1964
1965			
	I.C.C.	Petition to use Government attorney's memorandum as exhibit	Denied, Mar. 3, 1965
Mar. 3	I.C.C.	Letter requesting postponement of hearings on amended plan and to extend their scope	Denied by telegram, Mar. 4, 1965
Mar. 10	I.C.C.	Repeated requests to Examiner for further hearings	Denied, Mar. 10, 1965
1966			
July 28	U.S.D.C. Mass.	Motion to extend time to reveal Development Group's true representation	Time extended to Aug. 15, 1966
Aug. 19	U.S.D.C. Mass.	Statement re representation filed	
Sept. 7	U.S.D.C. Mass.	Petition for extension of time to file petitions for compensation	Time extended to Oct. 10, 1966
Oct. 20	U.S.D.C. Mass.	Petitions for compensation filed	
Dec. 1	U.S.D.C. Mass.	Motion for New Trial	Denied, Dec. 7, 1966
1967			
Jan. 6	U.S.D.C. Mass.	Notice of Appeal	Dismissed, Mar. 29, 1967

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
Feb. 15	U.S.Ct. App. 1st Cir.	Clerk's Notice fixing Feb. 23 as date for designation of parts of record to be printed and statement of points to be relied on, and Mar. 22 as date for brief and record appendage	
Feb. 18	U.S.Ct. App. 1st Cir.	Motion for 30-day extension of time for all of the above	Denied, Feb. 24, 1967
Feb. 24	U.S.Ct. App. 1st Cir.	Reply to Memorandum opposing Motion for 30-day extension	Denied, Feb. 24, 1967
Feb. 28	U.S.Ct. App. 1st Cir.	Statement of points to be relied on	
Mar. 1	U.S.Ct. App. 1st Cir.	Memorandum opposing appellees' motion to dismiss or affirm	
Mar. 1	U.S.Ct. App. 1st Cir.	Motion to enlarge time for designation for printing until Mar. 10	Granted Mar. 2, 1967
Mar. 2	U.S.Ct. App. 1st Cir.	Court's Order denying appellees' motion to dismiss or affirm and extending time for supplemental designation to Mar. 10	
Mar. 2	U.S.Ct. App. 1st Cir.	*Partial* designation for printing	
Mar. 10	U.S.Ct. App. 1st. Cir.	*Partial* designation for printing	
Mar. 21	U.S.Ct. App. 1st Cir.	Motion to be excused from part of printing and for extension of time for brief	Denied, Mar. 24, 1967

Date Initiated	*Tribunal*	*Proceeding*	*Disposition*
Mar. 28	U.S.Ct. App. 1st Cir.	Memorandum in opposition to second motion to dismiss or affirm	
Mar. 28	U.S.Ct. App. 1st Cir.	Motion for reconsideration of Mar. 24th denial of motion re printing and extension of time	Denied, Mar. 29, 1967
Apr. 12	U.S.Ct. App. 1st Cir.	Petition for rehearing	Denied, Apr. 18, 1967
Apr. 14	U.S.Ct. App. 1st Cir.	61-page incompleted brief	
July	U.S. Sup. Ct.	Request for extension of time to file petition for certiorari	Granted
Aug.	U.S. Sup. Ct.	Request for extension of time to file petition for certiorari	Granted
Sept. 12	U.S.D.C. Mass.	Petition to return plan to I.C.C. under §208	Denied, Sept. 19, 1967
Sept. 29	U.S.D.C. Mass.	Motion to reconsider denial of Sept. 19th	Pending

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 624

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,

v.

CHARLES W. BARTLETT, TRUSTEE, ET. AL.,
Respondents.

BRIEF OF RICHARD JOYCE SMITH AND WILLIAM J. KIRK, TRUSTEES OF THE PROPERTY OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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October 11, 1967

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OPINIONS BELOW

The opinions of the Court of Appeals for the First Circuit which are involved in the petition for certiorari are the "Memorandum and Order" dated March 29, 1967, dismissing appellant's appeal, and the "Memorandum and Order" dated April 18, 1967, denying appellant's petition for rehearing. They are unreported, and are annexed hereto as Appendices A and B and made a part hereof.

The Report of the Interstate Commerce Commission approving the Boston and Providence Railroad Corporation (B&P) reorganization plan is dated March 11, 1966, and is found at 327 I.C.C. 10. The opinion of the District Court for the District of Massachusetts approving the plan is dated November 8, 1966, and is reported at 260 F. Supp. 415.

QUESTION PRESENTED

In dismissing petitioner's appeal "for want of diligent prosecution," did the United States Court of Appeals for the First Circuit so far depart "from the accepted and usual course of judicial proceedings" as to require an exercise of this Court's jurisdiction under Rule 19.1.(b)?

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

Despite two extensions of time for the filing of a petition for certiorari, the petition for certiorari as filed states no reasons for granting the writ.

Instead, the petition for certiorari seeks to incorporate the materials contained in the petition for mandamus previously filed by petitioner (No. 661, Misc.), including a lengthy brief on the merits to the Court of Appeals for the First Circuit, which was never properly filed in that Court. This attempt disregards this Court's Rule 23 and particularly paragraph 3 thereof.

If, despite petitioner's disregard of this Court's rules, this Court should deem it appropriate to consider the petitioner's materials contained in the mandamus proceeding in determining this petition for certiorari, then respondents respectfully ask this Court to consider their opposing brief in the mandamus proceeding.

CONCLUSION

For the foregoing reasons, the Trustees of the property of The New York, New Haven and Hartford Railroad Company, urge that the petition for a writ of certiorari be denied.

Respectfully submitted,

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Of Counsel
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New Haven,
Connecticut 06506

JAMES GARFIELD
30 State Street
Boston, Massachusetts 02109
Attorney for Richard Joyce Smith and William J. Kirk, Trustees of the property of The New York, New Haven and Hartford Railroad Company

October 11, 1967

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing brief upon all parties of record in this proceeding by depositing in the United States Post Office at Boston, Massachusetts, with first-class postage prepaid, a copy thereof properly addressed to counsel of record for each of the said parties at his post office address.

Dated at Boston, Massachusetts, this 11th day of October, 1967.

JAMES GARFIELD
30 State Street
Boston, Massachusetts 02109

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6873.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
APPELLANT,

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,
APPELLEES.

[IN THE MATTER OF BOSTON AND PROVIDENCE RAILROAD CORPORATION OF BOSTON.]

MEMORANDUM AND ORDER

March 29, 1967

Per Curiam. The court has considered appellant's motion for reconsideration, appellees' second motion to dismiss, and appellant's memorandum in opposition thereto. In the last mentioned, appellant's counsel states that he was "led to believe" certain things. Careful inquiry of our clerk's office discloses that he was not led to believe any of the stated matters by that office. He was not led to believe them by the court. We cannot understand how, when appellant by order of court was denied a motion for extension for a month, he should have assumed that a motion to extend for a week would be granted simply by asking for it, let alone that he could ask for it the last day, too late for him to do anything if we denied it. Nor do we understand how he could think, having filed a designation of what he proposed to print, that he could, on said last day, expect that he could be allowed not to print various designated matters, or even furnish copies to the court or counsel.

Finally, we do not understand how counsel thought, by asking this further extension, and shortening appellees' time, that he was not, as he puts it, "cramping appellees," particularly having in mind counsel's own characterization that "This is no ordinary appeal." We also note that the printer has informed us this morning that the record cannot be printed even on the date to which extension is now asked. Had counsel diligently conferred with appellees and made arrangements with them, or, had he conferred with our clerk and learned our customary procedure for ordering temporary copies to appellees so that they would not be cramped, we might be more receptive to his present assertion of concern.

Counsel had been fully warned by appellees' prior motion to dismiss that in their view time was of great importance in this case. Our own action had indicated that we agreed. The order of the District Court approving the Plan of Reorganization was entered on November 21, 1966. Appellant's subsequent motion was denied on December 7, 1966. We do not think that the fact that appellant chooses to employ counsel "without an office staff," or, apparently, other associates to whom he entrusts any work, should entitle him to set his own time schedule, break his own express commitments as to printing, and limit his consideration of our rules and procedure to making inquiry, it would seem, of his printer, and expect us to reverse our stand that in a case of this importance appellees, too, were entitled to consideration. We decline to reverse our action on the motion to extend time, and we allow appellees' second motion.

Order. The appeal is dismissed for want of diligent prosecution.

By the Court:

ROGER A. STINCHFIELD
Clerk.

Enter:
ALDRICH, CH. J.

APPENDIX B

"MANDATE"

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 6873.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,

APPELLANT,

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.,

APPELLEES

[IN THE MATTER OF BOSTON AND PROVIDENCE RAILROAD CORPORATION OF BOSTON.]

MEMORANDUM AND ORDER.

April 18, 1967.

Per Curiam. In connection with petitioner's request for rehearing reference is first made to our memorandum and order of March 29, 1967, much of the contents of which remains pertinent to, and is incorporated in, this memorandum. The relevant portions of petitioner's request may be summarized as follows:

1. Petitioner charges the court with not considering the merits. This, of course, is true. The reason the case was dismissed was because petitioner had not exercised reasonable diligence in presenting the merits.

2. Petitioner says that it is unfair to penalize it for the dereliction of its counsel. Our answer to this is that if someone must suffer because of dereliction of counsel it is more appropriate that it be his own client than the other side. This seems particularly so when it appears that the other side was vigorously objecting to postponement* and counsel for petitioner was using the delay, and perhaps capitalizing on it, to seek a settlement.

3. With respect to petitioner's asserted realization that he could not expect an extension which would postpone the time for argument, we must repeat that this was the necessary effect of what he did ask. Amplifying what we said before, had he made specific inquiry of the clerk's office he would have been told that an appellee's brief is due under the rules the Friday, plus a week, before the opening of the sitting. This is to permit time for a reply brief, so that request for permission to file such after the argument will be avoided. Hence the extension which petitioner requested would not have allowed the "one month" that it continues to talk about, but the rule's absolute minimum of three weeks. We have read the tendered galley of the brief which petitioner now wishes to file. It is incomprehesible that petitioner could have thought it fair, or even possible, that some 60 pages of assertion of broad and extensive mistakes of conduct, discretion, and law, could have been answered in three weeks.† Furthermore, we note that petitioner makes no reply to the statement in our previous memorandum that petitioner's printer informed us it could not possibly meet even the new date to which extension was sought.

*It should not be forgotten that appellees had moved to dismiss once before, and we had supported petitioner. (March 2, 1967).

†Petitioner's proposed brief complains of a large number of alleged improprieties commencing in 1936 and continuing almost uninterruptedly for thirty years. What date is selected for the commencement of its legal complaints is not clear.

In a reorganization proceeding, where pressing and important matters are involved, as appellees had fully brought to petitioner's attention, for an order of confirmation entered in November not to be reached until June is extraordinarily undesirable. For the reasons presently and hitherto given, we will not allow it.

Order. The petition is denied.

By the Court:

ROGER A. STINCHFIELD
Clerk.

Enter:

ALDRICH, CH. J.

Certified as a true copy and issued in lieu of formal mandate under Rule 33. Apr. 25, 1967.

ROGER A. STINCHFIELD
Clerk.

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BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,

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CHARLES W. BARTLETT, TRUSTEE, *et al.*,

RESPONDENTS.

No. 661, Misc.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,

PETITIONER,

v.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, *et al*

ON PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE A WRIT OF MANDAMUS

MEMORANDUM FOR THE BOSTON & PROVIDENCE RAILROAD CORPORATION, DEBTOR, IN OPPOSITION

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Blanchard Press, Inc., Boston, Mass. — Law Printers

Supreme Court of the United States

OCTOBER TERM, 1967

No. 624

BOSTON & PROVIDENCE RAILROAD
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PETITIONER,

v.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT, *et al*

ON PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE A WRIT OF MANDAMUS

MEMORANDUM FOR THE BOSTON & PROVIDENCE RAILROAD CORPORATION, DEBTOR, IN OPPOSITION

Petitioner, aggrieved by the District Court's approval of a Plan of Reorganization for the Boston & Providence Railroad Corporation, filed a timely notice of appeal. There-

after, it sought, first, an extension of thirty days for filing the designation of portions of the record to be printed, statement of points to be relied upon, and brief. This was denied. Then one week after the deadline, it filed a partial designation of the record together with another motion for enlargement of time. Over the strenuous objections of other parties (and without the concurrence of any) the Court did grant an extension for filing a supplemental designation. But it declined to grant another extension of time for filing the brief and ultimately dismissed the appeal for want of diligent prosecution. Petitioner complains that the Circuit Court of Appeals' refusal to grant the requested extension constitutes an abuse of discretion and maintains that as a consequence this Court should direct that its appeal be heard.

As the Debtor sees it, the only question presented by the Petition for Certiorari is whether the Court of Appeals, in dismissing the Petitioner's appeal to that Court "so far departed from the accepted and usual course of judicial proceedings... as to call for an exercise of this Court's power of supervision." Rule 19, Rules of Supreme Court. Except for exercising its discretion once in Petitioner's favor, the Court of Appeals did no more than insist on compliance with its rules. Even if the case were of public importance, or involved a conflict of law, which Petitioner does not allege it does, Petitioner has no right to insist that the Court's discretion be exercised in its favor. In sum, Petitioner asked for exceptional treatment. His request was considered, and was denied. Since nothing is alleged that goes to support his charge of abuse of discretion, there is no basis for a Writ of Certiorari.

Assuming Mandamus rather than Certiorari would be the proper remedy for a party aggrieved by a gross departure from the accepted and usual course of judicial proceedings in the Court of Appeals, the question of its

issuance by this Honorable Court is the same question as it presented by the Petition for Certiorari. Meeting the point in a somewhat different way, far from departing from the usual course of judicial proceeding, in refusing to make a second exception to its Rules, the Court of Appeals declined to vary its usual procedure, after consideration and for cause. Had its reasons been entirely misguided, or even improper (if one can conceive of such a case) still, it would not follow that upon a proper exercise of discretion, an extension should have been granted, so that, as the Debtor sees it, Petitioner's right would be only to have its request for an extension reconsidered. The Debtor respectfully submits that it has as much right as the Petitioner to have the Circuit Court's discretion fairly exercised. Even had an abuse been involved, which is nowhere alleged by Petitioner (except by characterization), this fact should not, as the Debtor sees it, give Petitioner automatically the right to have the Court of Appeals grant his requested extensions and hear his appeal.

Respectfully submitted

Boston & Providence Railroad Corporation

By: Laurence M. Channing

LAURENCE M. CHANNING
225 Franklin Street
Boston, Mass.
Attorney for the Debtor.

October 13, 1967

I, LAURENCE M. CHANNING, attorney for the Boston & Providence Railroad Corporation, hereby certify that I have served this memorandum on each of the parties in this proceeding in compliance with Rule 33(1) and (2)(a), Supreme Court Rules, by mailing a copy thereof to each counsel of record as follows:

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LAURENCE M. CHANNING

October 13, 1967

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v.
CHARLES W. BARTLETT, Trustee, ET AL.,
Respondents.

No. 661 Misc.

BOSTON AND PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,
v.
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE A PETITION, AND PETITION FOR A WRIT OF MANDAMUS.

BRIEF FOR THE BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE, RESPONDENTS, IN OPPOSITION.

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ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

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Supreme Court of the United States.

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UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL.,
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ON PETITION FOR A WRIT OF CERTIORARI AND MOTION FOR LEAVE TO FILE A PETITION, AND PETITION FOR A WRIT OF MANDAMUS.

BRIEF FOR THE BOSTON AND PROVIDENCE RAILROAD CORPORATION STOCKHOLDERS COMMITTEE, RESPONDENTS, IN OPPOSITION.

The Question Presented.

This case presents only one question—whether the Court of Appeals properly dismissed the appeal of Petitioner for having failed to comply with the Court's order as to the time for filing its brief on appeal.

Statutes Involved.

Relevant portions of section 77(e) of the Bankruptcy Act (11 U.S.C. 205(e)) and of 11 U.S.C. 208, are printed in the appendix hereto.

Statement of the Case.

Under date of March 11, 1966, the Interstate Commerce Commission, in the exercise of its powers and duties under Section 77(d) of the Bankruptcy Act (11 U.S.C. 205(d)), issued its Seventh Supplemental Report and Order approving a Plan of Reorganization for the Boston and Providence Railroad Corporation, Debtor.

The Plan of Reorganization so approved (the Plan) had been proposed by the Boston and Providence Railroad Corporation Stockholders Committee (the Stockholders Committee), the officially recognized representatives of the stockholder interest.* As approved, the Plan was and is supported by the Stockholders Committee, the Debtor Corporation, the Trustee in Reorganization of the Debtor,

*The Stockholders Committee, as presently constituted, was authorized by Order of the I.C.C. dated March 13, 1962. At the time of the District Court's hearing on the Plan, the Stockholders Committee represented 16,244 out of the 20,770 shares of stock of the Debtor in the hands of the public, as distinguished from those held by the New Haven (260 F. Supp. 417).

the Reorganization Trustees of the New York, New Haven & Hartford Railroad (the New Haven)—as holders of all of the Debtor's debentures and 15,918 shares of its common stock (out of a total of 36,688 shares outstanding, exclusive of shares held in sinking fund and in treasury)—and by the United States, as pledgee of all of the Debtor's debentures. The New Haven and the United States, as holder and pledgee, respectively, of the debentures, are the sole creditors of the Debtor (260 F. Supp. 419).

The only party filing objections to the Plan was the present Petitioner, which claimed to represent, at most, five or six shareholders owning a total of about 2,500 shares (260 F. Supp. 419).

The District Court, after hearing, and consideration of briefs filed by Petitioner and others, issued its opinion and order approving the Plan on November 21, 1966 (260 F. Supp. 415).

On December 1, 1966, Petitioner filed its motion for new trial and other relief with the District Court. This motion was denied on December 7, 1966, and on January 6, 1967, Petitioner filed a notice of appeal from the District Court's order approving the Plan and from its denial of Petitioner's motion for new trial and other relief.

Petitioner's appeal was docketed by the Court of Appeals for the First Circuit on February 15, 1967, at which time Petitioner was notified to file its designation of the portions of the record to be printed in the record appendix to the brief and its statement of points to be relied upon by February 23, 1967, and its brief by March 22, 1967.

On February 18, 1967, Petitioner filed a motion to enlarge by thirty days the time for filing each of its designation of portions of the record to be printed, statement of points to be relied upon and brief. This motion was denied.

Despite this denial, Petitioner did not file its statement of points until February 28, 1967, five days after the deadline set by the Court of Appeals, and filed only a partial designation of the portions of the record to be printed on March 2, 1967, one week after said deadline, together with another motion for enlargement of time. On February 27 the Stockholders Committee moved for dismissal of the appeal because no statement or designation had then been filed by Petitioner. The Court of Appeals denied this motion and granted Petitioner until March 10, 1967, to furnish a supplemental designation.

On March 21, 1967, the day before the deadline for filing its brief, Petitioner filed its third motion for enlargement of time. On March 23 the Stockholders Committee moved once again for dismissal of the appeal because of Petitioner's failure to file on time. On March 24 the Court of Appeals denied Petitioner's third motion for enlargement of time.

On March 28, 1967, with its brief then a week late, Petitioner moved for reconsideration of its third motion for enlargement of time. On March 29, 1967, the Court of Appeals denied this motion and dismissed Petitioner's appeal for the reasons stated in the memorandum and order which appears as Appendix A to Petitioner's petition for a writ of mandamus. On April 14, 1967, Petitioner filed with the Court of Appeals a petition for rehearing. The Court denied this petition by its memorandum and order of April 18, 1967 (Appendix B to the petition for a writ of mandamus) and issued its mandate on April 25, 1967.

Argument.

I. A Petition for Writ of Mandamus is Not an Appropriate Means by which to Seek Review of a Final Decree of a Court of Appeals Dismissing an Appeal for Want of Diligent Prosecution.

A. The Writ of Mandamus should Not be Employed to Control the Discretionary Action of a Court of Appeals in Dismissing an Appeal for Want of Diligent Prosecution.

The issuance by the Supreme Court of a writ of mandamus "is not a matter of right but of sound discretion sparingly exercised." Rule 30, Supreme Court Rules. The writ is exercised only in "really extraordinary causes." *Ex Parte Fahey*, 332 U.S. 259, 260 (1947); accord: *Roberts* v. *United States District Court*, 339 U.S. 844, 845 (1950).

The appropriate circumstances in which a writ of mandamus is issued is where there has been a "usurpation of judicial power" or where there has been a "clear abuse of discretion." *Schlagenhauf* v. *Holder*, 379 U.S. 104, 110 (1964). Since no usurpation of judicial power is present here, Petitioner's claim must be that the First Circuit abused its discretion when it refused to allow Petitioner additional time to prepare its brief.

In most instances, however, the Supreme Court has refused to grant mandamus where a discretionary act is involved. See, *e.g.*, *Parr* v. *United States*, 351 U.S. 513, 520-521 (1956) (granting of motion to dismiss indictment by trial court); *In re Haberman Manuf. Co.*, 147 U.S. 525, 530 (1893) (refusal to grant supersedeas); *Hudson* v. *Parker*, 156 U.S. 277, 289 (1895); *In re Hawkins, Petitioner*, 147 U.S. 486, 490 (1893), and cases cited therein; *Ex parte Cutting*, 94 U.S. 14, 22 (1876). "[The writ of mandamus] does not lie to control judicial discretion, except when that

discretion has been abused . . ." *Virginia* v. *Rives,* 100 U.S. 313, 323 (1879).

Perhaps the closest precedent to the present case is *Ex parte Brown,* 116 U.S. 401 (1886). There, a State Supreme Court had dismissed a case docketed before it "for want of due prosecution." The United States Supreme Court refused to issue a writ of mandamus. "Mandamus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. This rule is elementary." *Id.* at 402. In *Platt* v. *Minnesota Mining & Manuf. Co.,* 376 U.S. 240 (1964), the Supreme Court *reversed* a Court of Appeal's issuance of a writ of mandamus to a District Court judge to transfer an anti-trust case on the grounds that the question of transfer was within the discretion of the trial judge and could not be challenged by mandamus. *Id.* at 245.

Whether a litigant should be granted an extension of time to file his record and brief on appeal is clearly within the discretion of the Court of Appeals. Rule 73(a) of the Federal Rules of Procedure states that "Failure of an appellant to take any step other than the timely filing of a notice of appeal . . . is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal."

In many cases the various circuits have exercised this discretion to dismiss appeals where briefs and records have not been timely filed. *E.g., Weinberger* v. *Group,* 339 F. 2d 34, 35 (1st Cir. 1964); *Citizens' Protective League, Inc.* v. *Clark,* 178 F. 2d 703, 704 (D.C. Cir. 1949); *United States* v. *Lathrop,* 199 F. 2d 954 (9th Cir. 1952); *Brennan* v. *United States Gypsum Co.,* 330 F. 2d 728, 729 (10th Cir. 1964); *Tucker Products Corp.* v. *Helms,* 171 F. 2d 126 (9th Cir. 1948); cert. den. 336 U.S. 938 (1949) (neglect of counsel is no excuse); *Maghan* v. *Young,* 154 F. 2d 13 (D.C. Cir. 1946) (same); *United States* v. *Bowen,* 310 F. 2d 45, 47 (5th Cir. 1962) (same).

Hence it would seem that the First Circuit's decision dismissing Petitioner's appeal for want of diligent prosecution, especially when supported by a memorandum of the facts of the case contradicting Petitioner's broad assertions, was clearly not of a character to call for a mandamus from this Court.

B. The Writ of Mandamus is an Extraordinary Remedy which should Not be Sought or Granted when the Petitioner may Properly Seek the Wholly Adequate Alternative Remedy of a Writ of Certiorari.

The Supreme Court cases dealing with mandamus are replete with statements that mandamus will not issue where the Petitioner has open to him a satisfactory alternate action. *E.g., Ex Parte Baldwin,* 291 U.S. 610, 619 (1934); *Ex Parte Slater,* 246 U.S. 128, 134 (1918). "Nothing is better settled than that the writ of mandamus will not ordinarily be granted if there is another legal remedy . . ." *United States* v. *Duell,* 172 U.S. 576, 582 (1899). Perhaps the most obvious satisfactory alternative is the writ of certiorari as a means of reviewing the correctness of a final order or decree. Thus in *Ex Parte Barber Asphalt Co.,* 274 U.S. 711 (1927); mandamus was denied, and on the same day, in the same case, certiorari was granted *sub nomine Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.,* 274 U.S. 728. Similarly, in *Ex Parte Lakewood Engineering Co.,* 274 U.S. 711 (1927), mandamus was denied and a week later certiorari was granted *sub nomine Lakewood Engineering Co.* v. *A. W. French & Co.,* 274 U.S. 729.

Where the Supreme Court has granted mandamus it has generally done so well before the time of final judgment or decree, for the purpose of preventing the useless continuance of possibly long and expensive proceedings (*In re*

Winn, 213 U.S. 458 (1909); *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); but, where a final judgment, order or decree has already been entered and the mandate of the Court of Appeals has issued, as in the present case, the extraordinary remedy of mandamus can afford Petitioner no relief which the more customary remedy of certiorari will not offer.

One of the specifically designated instances in which a writ of certiorari will issue, *when the necessary special and important reasons are present*, is to correct a departure by a lower court from the accepted and usual course of judicial proceedings if such departure calls for the exercise of the Supreme Court's power of supervision. Rule 19, Supreme Court Rules. Hence, if the Court of Appeals for the First Circuit had in fact been guilty of an abuse of discretion in dismissing Petitioner's appeal, a writ of certiorari may appropriately issue.

There is, however, no need or justification for the employment in the present case of the extraordinary remedy of a writ of mandamus.

II. Neither a Writ of Mandamus nor a Writ of Certiorari should Issue, because the Court of Appeals has Not Abused its Discretion in Dismissing the Appeal of Petitioner.

Whether mandamus or certiorari is the proper remedy to correct an abuse of discretion, there is no element of such abuse in the present case.

A. Petitioner's Dilatory Conduct of its Appeal Fully Justified Dismissal.

As the statement of fact shows, and as the memoranda of the Court of Appeals so forcibly demonstrate, Peti-

tioner's conduct of this appeal has been characterized by dilatory action in the face of the repeated protests of the proponents of the Plan. Petitioner was late in filing its statement of points, late in designating the record and late in submitting its brief. In these circumstances we submit that the Court of Appeals would have been justified, whatever the nature of the proceeding, in dismissing Petitioner's appeal.

Petitioner's arguments that it was entitled to special consideration because of early filing of its notice of appeal, or because of conflicting commitments in related proceedings, are lacking in merit.

Petitioner did not make an especially early filing of its notice of appeal. The presence of the United States as a party did not give Petitioner sixty days in which to file. The time limits of Rule 73(a) of the Federal Rules of Civil Procedure do not apply to cases arising under the Bankruptcy Act. 28 U.S.C. § 2107. Collier on Bankruptcy (14th Ed.), § 25.02.

The hearings of the Interstate Commerce Commission on petitions for allowances, which opened in Washington, D.C., on January 16, 1967, were held, in ordinary course, upon petitions for fees submitted on or prior to October 10, 1966 by most of the parties to these proceedings and/or their counsel. All the fee petitioners desiring to be heard, other than Petitioner and its attorneys, attended the said hearings on January 16 and 17, 1967. Petitioner, however, requested postponement, and, in accordance with its request, did not commence the presentation of its petitions until January 24, 1967. The attorney for the New Haven, who attended throughout the hearings, by letter to the Commission dated February 13, 1967, suggested that the deadline for filing briefs with respect to all of the fee petitions be advanced, in the interest of all parties, from March 20, 1967, to March 1, 1967. Only counsel for Petitioner op-

posed this suggestion. It may therefore be concluded that such pressure of time as the Appellant was under, at the time for briefing its appeal, by reason of the fee petition proceedings, was largely of its own manufacture.

The action of Petitioner's counsel in attending the Interstate Commerce Commission's hearings in New York City on January 16, 1967, on the proposed merger of the New York Central and Pennsylvania Railroads to present "a proposal to settle the B & P controversy with the New Haven" was wholly voluntary, irrelevant and uncalled for. Petitioner has no standing whatever to speak for the Boston & Providence Estate or to offer proposals on its behalf.

B. A Court of Appeals is Under a Special Duty to Require Diligence in an Appeal from a District Court's Order Approving a Plan for the Reorganization of a Railroad.

> "Not only are those who institute the proceeding and those who carry it forward bound to exercise the highest degree of diligence, but it is the duty of the court and the Interstate Commerce Commission to see that they do. Proceedings of this character, involving public and private interests of such magnitude should, so far as practicable, be given the right of way both by the court and by the commission, to the end that they may be speedily determined."
>
> *Continental Illinois National Bank* v. *Chicago, Rock Island & Pacific Railway Co.*, 294 U.S. 648, 685 (1935).

Since the salutary principle quoted above was laid down, the Bankruptcy Act has been amended by the insertion of 11 U.S.C. § 208, by 62 Stat. 167 (1948), so as to increase the importance of diligence before the courts in railroad reorganization proceedings. By that section any party is

given the right to require the Interstate Commerce Commission, in any reorganization proceeding in which more than eighteen months have elapsed between the date on which the plan is certified by the Commission to the District Court and the date on which the plan is confirmed and any appeal from such confirmation disposed of—

> "to report to the court in which consideration of such plan is then pending, any changes, facts, or developments which have occurred since the approval of such plan by the commission, which were not provided for in the plan, and which in the opinion of the commission make it necessary or expedient for the commission to reexamine or reconsider and, if necessary, to revise such plan . . ." 11 U.S.C. 208(a)(1).
>
> "Upon the filing of such petition . . . all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the commission and certification of its action thereon to the court." 11 U.S.C. 208(a)(5).

The clear implication of this statute is that a plan of railroad reorganization should in ordinary course be approved and confirmed promptly, and in any event within eighteen months. In the present case the eighteen-month period runs out on or about December 1, 1967.

Two and one-half years were spent by the Commission in examining, conducting hearings and reporting upon and certifying the presently pending Plan of Reorganization of the Debtor. All of the work of this lengthy and costly administrative process may be undone if the District Court and the Court of Appeals do not act, and insist that the interested parties act, with due diligence. The extension of time for filing brief requested by Petitioner would, if granted, almost certainly have delayed the hearing of the appeal from approval of the Plan until after the May sit-

ting of the Court of Appeals. The Interstate Commerce Commission, as a matter of practice, will not commence even the preparation of materials for submission of a Plan of Reorganization to the shareholders and creditors of the Debtor while an appeal from approval is pending. The hearing of the District Court on confirmation of the Plan cannot, in turn, be held until after the submission has been made and the polling of the stockholders and creditors completed. Bankruptcy Act, Section 77(e), 11 U.S.C. 205(e).

Petitioner's brief was still incomplete as late as April 17, 1967, when it was submitted, in incomplete form, in support of the petition for rehearing filed that day. Had the Court of Appeals extended Petitioner's time until a complete brief could have been filed, and allowed proponents a reasonable time to answer the same,* it is distinctly possible that the hearing of this appeal would have been delayed until the fall of 1967. In that event a Section 208 proceeding would have been inevitable.

Finally, this particular railroad reorganization is one the feasibility of which is in constant danger from delay. The ability of the New Haven to purchase the Debtor's assets and to pay the Debtor's stockholders $110 per share in cash is, obviously, dependent on the ability of the New Haven to preserve unimpaired the funds necessary for this purpose. Every additional day of deficit operation which the New Haven must endure places these funds in greater peril. 260 F. Supp. 421. We submit that the Court of Appeals could not, in the reasonable exercise of its discretion for the protection of the public interest and the interest of the Debtor, its stockholders and creditors, do anything *but* dismiss Petitioner's appeal for want of diligent prosecution.

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*"It is incomprehensible that Petitioner could have thought it fair or even possible that some 60 pages of assertion of broad and extensive mistakes of conduct, discretion and law could have been anwered in three weeks." Memorandum and Order of April 18, 1967, Appendix B to Petitioner's Petition for Mandamus.

III. There is No Question of General Significance Presented.

This case presents no issue other than that of whether a Court of Appeals properly dismissed the appeal of an appellant who had failed to comply with the Court's order as to the time for filing its brief on appeal. The answer to this question depends so completely on the particular facts of the case that its answer can have no general significance or application. None of the usual reasons for granting certiorari are asserted by Petitioner, and no such reasons are shown.

Conclusion.

For the foregoing reasons the undersigned respondent hereby respectfully requests that Petitioner's motion for leave to file a petition for mandamus, its petition for a writ of mandamus and its petition for a writ of certiorari be denied.

Respectfully submitted,

BOSTON AND PROVIDENCE
RAILROAD CORPORATION
STOCKHOLDERS COMMITTEE,
By Robert W. Meserve,
75 Federal Street,
Boston, Massachusetts.

Lewis M. Dabney,
Benjamin A. Trustman,
Benjamin H. Lacy,
Of Counsel.

[Appendix follows.]

Appendix.

Relevant Statutes.

Section 77(e) of the Bankruptcy Act (11 U.S.C. 205(e)) reads, in part, as follows:

". . . If the judge shall approve the plan, he shall file an opinion, stating his conclusions and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirements of subsection (c) of this section, and to the stockholders of each class, and/or to the committees or other representatives thereof, for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge; . . .

". . . The Commission shall certify to the judge the results of such submission.

"Upon receipt of such certification, the judge shall confirm the plan if satisfied that it has been accepted by or on behalf of creditors of each class to which submission is required under this subsection holding more than two-thirds in amount of the total of the allowed claims of such class which have been reported in said submission as voting on said plan, and by or on behalf of the stockholders of each class to which submission is required under this subsection holding more than two-thirds of the stock of such class which has been reported in said submission as voting on said

plan; and that such acceptances have not been made or procedured by any means forbidden by law:

". . . If the judge shall confirm the plan, he shall enter an order and file an opinion with a statement of his conclusions and his reasons therefor."

11 U.S.C. 208(a) (1) and (5) read as follows:

"(1) with respect to any plan of reorganization or modified plan of reorganization approved by the Interstate Commerce Commission under the provisions of section 205 of this title, subsequent to April 9, 1948, it shall be the duty of the Commission, upon petition of any party to the proceeding filed at any time more than eighteen months after certification by the Commission to the court of the plan or of an order disposing of a like petition, but before any order confirming the plan shall have been entered, or, such an order having been entered, if an appeal from said order is pending on said date in a United States court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such appeal or to file such petition has not expired, to report to the court in which consideration of such plan is then pending, any changes, facts, or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that such plan, if consummated and put into effect, shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with

the provisions of this section and section 205 of this title. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision; . . .

"(5) each petition filed under the provisions of paragraph (1) or paragraph (3) of this subsection shall be filed with the court before which is pending the plan which is the subject of the petition and such petition shall be referred by the court to the Commission. Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court."

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 624

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP, PETITIONER

v.

CHARLES W. BARTLETT, TRUSTEE, ET AL.

No. 661 Misc.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP, PETITIONER

v.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND ON MOTION FOR LEAVE TO FILE A WRIT OF MANDAMUS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review, by either mandamus or certiorari, of the order of the Court of Appeals for

the First Circuit dismissing his appeal for want of diligent prosecution. Petitioner's brief and record appendix were due for filing in the court of appeals on March 22, 1967. On February 24, 1967, the court denied petitioner's motion for a 30-day extension of briefing time, which appellees had opposed. On February 27, 1967, appellees moved to dismiss the appeal on the basis of petitioner's failure to file and serve its designation of the record to be printed and the points to be relied on within the required time. The court denied the motion and extended this deadline. Then, on March 21, 1967—the day before its brief was due—petitioner filed a motion to extend its briefing time to March 31. The court denied this motion and, on March 29, 1967, dismissed the appeal for want of diligent prosecution. On April 12, petitioner filed a petition for rehearing and, two days later, a page proof of an incomplete draft of its proposed brief. On April 18, 1967, the court denied the petition for rehearing. Five months later, on September 15, 1967, the present petitions were filed in this Court.

The court of appeals acted within its authority and did not abuse its discretion in dismissing the appeal. This is not an appropriate situation for the issuance of a writ of mandamus by this Court. See, *e.g.*, *Ex parte Fahey*, 332 U.S. 258; Rule 30, Supreme Court Rules. Nor does petitioner present any question of importance warranting review under this Court's certiorari jurisdiction. Furthermore, the action of the court below was clearly warranted by the facts.

Several weeks before petitioner's brief was due, appellees had opposed an extension of briefing time, and had moved to dismiss for petitioner's failure to meet another deadline. Thus petitioner was on notice that appellees considered expeditious handling of the appeal to be vital. That the court of appeals agreed was made plain by its denial of petitioner's first motion for an extension. Moreover, the circumstances of the case made it plain to all that speed was essential.

This case involves the reorganization of the Boston & Providence Railroad, which is now being operated by the New York, New Haven & Hartford Railroad Company.[1] The success of the plan hinges on the ability of New Haven to make certain payments. New Haven is presently operating at a loss, and undue prolongation of the litigation may impair its ability to make the payments required by the plan. In its opinion upholding the reorganization plan, which had previously been approved by the Interstate Commerce Commission, the district court explained:

> After the 1954 plan had been approved by this court and the Court of Appeals, the time lapse caused by subsequent delaying proceedings initiated by the Development Group was so long that eventually the New Haven was no longer in a financial position to make the payments required of it and the plan became unfeasible. Today, the financial position of the New Haven

[1] The interest of the United States in the proceeding stems from its position as creditor of New Haven, holding a pledge of debentures of Boston & Providence.

> is such that undue prolongation of litigation over this plan may produce a similar result. * * *

In re Boston & Providence R.R. Corp., 260 F. Supp. 415, 421 (D. Mass.).

Only last Term this Court, in dismissing an appeal because of a docketing delay, observed that "if there are to be rules, there must be some limit to our willingness to overlook their violation." *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.*, 385 U.S. 32.[2] And since delay in this case could cause substantial injury to the railroad and its creditors, the court of appeals correctly observed that "if someone must suffer because of dereliction of counsel it is more appropriate that it be his own client than the other side" (Pet. App. 5a). The validity of the reasons now proffered to excuse petitioner's counsel's failure to meet his deadlines does not present any question warranting review by this Court.

Respectfully submitted.

RALPH S. SPRITZER,
Acting Solicitor General.

OCTOBER 1967.

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[2] Indeed, this Court has repeatedly upheld a lower federal court's refusal to hear a case when that court's time limits have not been complied with. *E.g., Link* v. *Wabash R.R. Co.*, 370 U.S. 626; *Lord* v. *Helmandollar*, 348 F. 2d 780 (C.A.D.C.), certiorari denied, 383 U.S. 928; *Beaufort Concrete Co.* v. *Atlantic States Construction Co.*, 352 F. 2d 460 (C.A. 5), certiorari denied, 384 U.S. 1004.

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No. 624 and No. 661 Misc.

Supreme Court of the United States

OCTOBER TERM, 1967.

BOSTON AND PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,
v.
CHARLES W. BARTLETT, Trustee, ET AL.,
Respondents.

BOSTON AND PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,
v.
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS WITH PETITION ANNEXED

PETITIONER'S REPLY BRIEF

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November 7, 1967

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REPLY BRIEF

1. The nature of the opposition

The opposition to the petitions comes primarily from the New Haven, including echoes from persons serving in its *apparat* for the plan. The B&P trustee has not noted opposition. (Nor did he oppose petitioner in the Court of Appeals.)

For 29 years the New Haven has maneuvered judicial avoidance by a brilliant campaign of procedural obstructions, so as to keep B&P and its owners in chancery[1] *by denying them the decisions on the merits which would extricate B&P,* always seeking to force a confiscation of the B&P enterprise through sale to New Haven — applying perpetual attrition until the B&P owners in time will accept confiscation (notwithstanding the $1,000 investment value of B&P shares and B&P's entire freedom from capital debt) rather than undergo more uncompensated years on the judicial merry-go-round.[2]

The echoing Kynett Stockholders Committee consists of three persons who were assembled to form a committee to sponsor a sale of the B&P enterprise to the New Haven under the formalities of Section 77, which New Haven has insisted on as the only way to prevent the B&P stockholders from obtaining an appraisal of their ownership. The testimony herein shows that late in 1963 the New

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[1] "In chancery. — 1. *Law.* In litigation in a court of chancery, as an estate. 2. *Boxing.* Of the head of an antagonist in a secure position under one's arm so that one can pommel it. 3. In a helpless position." Webster's Collegiate Dictionary (6th ed.).

In the new 7th edition boxing yields to wrestling, thus: "a wrestling hold that imprisons the head or encircles the neck: STRANGLEHOLD". That sounds right. But petitioner does not adopt its change in No. 3 altering "helpless" to "hopeless". Not while this Court sits.

[2] A term attributed to Judge Learned Hand.

Haven trustees (per Messrs. Dorigan, Moore, and Garfield) called on a New York broker, Joshua A. Rich IV, who had appeared in the New Haven proceeding before Judge Anderson in 1961 representing New Haven income bonds to urge the appointment of a particular trustee. They agreed on a $110 price for New Haven to offer to the B&P stockholders. In order to discourage the stockholders from seeking more, it was decided to present the offer as a plan obtained by a stockholders committee. Mr. Rich called in Ralph M. Arkush, Esq., (whom he had earlier brought in to organize a committee). Mr. Arkush undertook to put it through as a plan won by the Committee.[3] The members of the Committee own no B&P shares (according to a recent list) although at one time they held 50 shares. At the suggestion of Mr. Arkush Judge Anderson in New Haven approved allowing the New Haven to buy the B&P for $110 flat, but only on the condition that 2/3 of the B&P public stockholders should sign authorizations or proxies appointing the Kynett Committee to represent them (through Mr. Arkush) *before* the I.C.C. should begin its hearing to decide whether the plan was fair enough to be submitted to the stockholders. The Committee solicited authorizations as being necessary to comply with Judge Anderson's requirements and to prevent "forfeiture."[4] (The I.C.C. decided

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[3] See Appendix C to the mandamus petition, pp. 21-24. That document is referred to herein as Appendix C.

[4] Judge Anderson explained that he was seeking ways to close the "escape hatches" against the B&P stockholders. See *Second New Haven Reorganization*, U.S.D.C. (D.Conn.) No. 30, 226, Hearing March 2, 1964, Tr. 77, and Order No. 225.

He always excludes the B&P Corporation and its stockholders from participation in his proceedings concerning B&P, whether in the first N.H. reorganization or the second. Mr. Arkush dealt with Judge Anderson informally in chambers.

The first N.H. reorganization (No. 16,562) has been kept open because New Haven has never been reorganized *vis a vis* B&P. It is used to maintain New Haven's hold on B&P, and it is the longest Section 77 reorganization proceeding in history, open since 1935.

that the $110 plan would be forfeiture.) The authorizations expressly refrained from consenting to any plan. They provided standing for the Committee counsel and propaganda value. The Committee has a monopoly license from the I.C.C. to solicit stockholders. (See Appendix C. pp. 6-7.) Upon the death of Mr. Arkush his advocacy passed to his local Boston co-counsel now opposing petitioner in the name of the Committee committed to the New Haven.

To the extent that stockholder support for the plan is informed and not controlled by any conflicting interest in the New Haven or other railroads[5] it has been induced only by persuasion that the prospect of ever getting judicial decisions of B&P's crucial questions on the merits is too dim to wait for any longer.

B&P is probably New Haven's largest creditor, but its claim is unrepresented in Judge Anderson's Second proceeding.

The ineffectual B&P reorganization proceeding in Boston (*sans* properties, business, revenues, or accounting from the N.H. trustees in possession) has been unable to overcome the New Haven court's stranglehold. See *Warren* v. *Palmer*, 310 U.S. 132 (1940); *In re New York, N.H. & H. R. Co.*, 169 F. 2d 337 (2d Cir. 1948); Certiorari denied *sub nom. Mulcahy* v. *New York, N.H. & H. R. Co.*, Nov. 15, 1948, 335 U.S. 867 (No. 316).

[5] The Delaware & Hudson chairman and president has become B&P's largest individual stockholder.

The New Haven trustees have contracted to re-sell the B&P to Penn-Central on profitable terms. New Haven Trustee Smith assured the Pennsylvania and New York Central presidents that

> "the trustees considered that the B. & P. assets would be worth considerably more than what the trustees would be required to invest in order to acquire the assets."

President Saunders of P.R.R. said that

> "they would not recognize the validity of the claims of the [N.H.] trustees on the B. & P. bonds."

See Memorandum of conference of New Haven trustees with P.R.R. and N.Y.C. presidents dated December 2, 1964.

Offered as evidence at the I.C.C. New York hearing on January 16, 1967, received January 17. (See mandamus petition herein, pp. 15-16.) Filed in B&P reorganization I.C.C. compensation hearing Feb. 2, 1967, I.C.C. F.D. 12131, Tr. p. 1245. Marked Exhibit 39.

2. The court is the stockholders' true fiduciary

Petitioner (the Development Group) is the senior B&P stockholder party. It has maintained its continuity, its fiduciary mission for the entire B&P stockholder class, and its independence, intact since 1954. Petitioner is the only stockholder party not bound to the New Haven. The Development Group includes 2 of B&P's 6 directors. It has never sought general proxies. But it has never been limited to two stockholders (although two would be enough).[6] See Appendix C, pp. 5-7.

When confronted with two opposing stockholder groups Judge Friendly's remarks in a recent *Alleghany* case provide the correct judicial guide:

> Once a settlement is agreed, the attorneys for the plaintiff stockholders link arms with their former adversaries to defend the joint handiwork . . . .
>
> To say that "Through its representatives, it [Alleghany] elected to settle" is sheer fiction. Most of the independent Alleghany stockholders had no voice in the selection of their "representatives" or ability to evaluate the settlement their "representatives" had accepted for them. *I cannot see how the attorneys opposing the settlement were any more representative than the attorney opposing it. The stockholders' true representative was the court* . . . .
>
> *Alleghany Corp.* v. *Kirby*, 333 F.2d 327, 347 (2d Cir. 1964) (Emphasis added.)

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[6] See the Development Group's appeal to this Court for fair divisions, *Boston & Providence R. Corp. Stockholders* v. *New York, N.H. & H. R. Co.*, October Term 1955, No. 437.

See also the 1958 B&P petition for certiorari. *Boston & Providence R. Corp. and Stockholders* v. *New York, N.H. & H. R. Co.*, October Term, 1957 No. 859.

3. What made petitioner unable to print the record appendix and brief in final form was the court's rejection of the 1,213-page printed Record Appendix already existing.

In its two *per curiam* memoranda the Court of Appeals made several erroneous findings and conclusions against petitioner.[7]

To set the record straight, a true account of petitioner's dealings with the Clerk's office is appended hereto. In light of that account the conclusion that petitioner or its counsel did not prosecute the appeal with diligence is oppressive and absurd.

Ironically the court charged petitioner with trying to avoid printing designated matter, while impossibly forcing petitioner instead to reprint matter that was *not* designated. Ironically the court insisted in both memoranda that *appellant must be denied an extension because appellees must not.*

Close analysis is convincing, however, that what triggered the dismissal was the printer's report to the Clerk that it was *impossible* to meet the deadline with the new reprinting. That instantly propelled the dismissal—witness the first memorandum:

> We also note that the printer has informed us this morning that the record cannot be printed even on the date to which extension is now asked.
>
> (Appendix A, p. 2a)

The second memorandum says that "if someone must suffer" it ought to be the Boston & Providence side rather than the New Haven side.[8] p. 5a) It berates petitioner for supposedly supposing that the court might not grant an extension to appellees—an odd reason for dismissal.

---

[7] It would doubtless have reversed a district court for making them.
[8] But why must anyone suffer?

But it ends by returning to the determining factor, saying:

> Furthermore, we note that petitioner makes no reply to the statement in our previous memorandum that petitioner's printer informed us it could not possibly meet even the new date to which extension was sought. (pp. 5a-6a)

Petitioner asked the printer for an explanation and received this answering letter:

> Dear Mr. Rood:
>
> You've called my attention to the Court's memorandum of April 18th in this case, which states that "Petitioner's printer informed the Court it could not meet even the new date to which extension was sought."
>
> You will remember that I originally named April 3rd, as my earliest date if all material were immediately available. I understand that you changed it to March 31 after talking with the clerk's office. I informed you that we would try to meet this date. However, the original plan called for using a volume of the old record appendix that was printed in an earlier appeal.
>
> The situation became more complicated when you asked me to reprint part of the material in this old record appendix. When you added this material there was absolutely no doubt in my mind that the date of March 31st was impossible. I therefore informed you of this fact.
>
> Very truly yours,
> BLANCHARD PRESS, INC.
> JOHN A. SUTHERLAND
> *Treasurer.*

4. The court's rejection of the existing Record Appendix requires supervision as

(a) an oppressive departure from acceptable practice;
(b) a matter of national importance;
(c) a conflict with the other circuits.

A volume of the existing Record Appendix is tendered herewith. It is the same record, in the same court, the same case, having the same questions, with the same parties.[9]

It is a $10,000 document, which raises the matter of litigation expense. Unlike the others, the First Circuit has done nothing to alleviate the ever-increasing costs of letterpress printing. 1967 might as well be 1867.

Rules of procedure, as Mr. Justice Black insists, should not be enforced to deprive parties of decision on the merits. But here Cardozo's *demon of formalism* has taken possession more extremely than in any of Justice Black's recent examples.

It comes to this. Unless this Court will now intervene, the Boston & Providence and hundreds of owners, following 29 years of appalling mistreatment by judicial avoidance[10] maneuvered against them procedurally by their avaricious fiduciary in New Haven, must now suffer confiscation by surrender of $5,000,000 for the debentures (not

---

[9] The United States claims a legal interest herein as an additional party by being a fully secured creditor of New Haven on a loan now in good standing. Petitioner says the United States has no creditor interest in B&P. As *parens patriae* the Government should support petitioner.

[10] The district court will not hear petitioner's motion to adjudicate the debentures, its motion to require B&P to file annual reports to the I.C.C. as Class I line-haul carrier (instead of on the lessor form), or its petition for a hearing on the best way to sell the highway route.

to mention at least $10,000,000 in property values) simply because—

(a) the Commission approved the surrender as fair *if* the district court should hold B&P liable on the debentures;

(b) the district court approved the Commission plan but refused to pass on the debentures (which Penn-Central does not recognize as valid);[11]

(c) the court of appeals refused to review the matter, holding that hundreds of Boston & Providence stockholders "must suffer" the confiscation without adjudication because their lawyer and printer could not meet a printing requirement which was superfluous, wasteful, and burdensome, on a schedule shown to be impossible.

The issue transcends B&P and railroad reorganizations. The matter of printing costs is a serious issue of national judicial administration, increasingly shutting the door.

The sides are most uneven. The stockholders have obtained no reimbursement. The I.C.C. sits on their petitions for allowances. New Haven, on the other hand, is the most active railroad corporation litigant.

The stockholders do not get proper protection through the ineffectual B&P reorganization in Boston. But B&P should not be a court debtor. Its railroad is still prime, and now subsidized. Its disposable real estate in Boston and Providence offers coveted sites for enormously valuable non-railroad developments. B&P's investment value exceeds $1,000 per share. Petitioner can prove (if the federal judiciary will ever allow decision on the merits) that B&P has no capital debt. B&P's cash assets exceed $2,000,000. The Commonwealth is doing its best to over-

[11] *Supra*, note 5 on page 3.

come New Haven barriers by getting a surplus B&P route into Boston for Interstate Highway 95 so as to pay B&P perhaps $8,000,000, or $200 per share. Then all pretext for keeping B&P in chancery should vanish. New Haven (now joined by Penn-Central) seeks to force the title into New Haven first (for Penn-Central's benefit). In refusing to consider petitioner's administrative objections to the plan in 1966, Judge Ford said they would be settled by agreement, as then seemed possible. But New Haven will not confer. On October 2, 1967, the P.R.R. assistant general counsel would not support petitioner's amendments (although the Commonwealth supported them before Judge Ford on October 11) that would solve the B&P problem and the Commonwealth's problem. He said that the question was whether the highway funds would mostly go to New Haven (for Penn-Central) for new railroad construction under the plan's fine type, or go (under the amendments) to the B&P stockholders.

5. This Court has special responsibility for supervision because it approved the impossible divided jurisdiction making the Boston court administration ineffectual.

When the New Haven court had B&P's lease rejected in 1938 (as of 1936) it retained B&P's properties to secure a prior lien claim that it allowed against B&P on the theory that New Haven had operated it for B&P account retroactively since 1936, and that the New Haven's division of operating revenues for B&P as a separate carrier estate east of Providence produced a deficit of $100 per B&P share through 1937. With those auspicious beginnings B&P went into a Section 77 administration in Boston, but the Boston court was unable to get the B&P properties, business, earnings, or control over the measure of earnings.

New Haven has kept hold, and there has been no accounting, although (even with recent New Haven deficits) the joint net railway operating income awaiting division with B&P under the standards of Section 15(6) of the Interstate Commerce Act (Appendix C, p. A-1) exceeds $100,000,000 through 1966, as shown in *Moody's*.

This Court repeatedly rebuffed the efforts to straighten out the judicial impossibility of the split jurisdiction between two circuits. See the four Supreme Court decisions cited in footnotes 4 and 6 *supra*. The rebuff has rendered the Boston proceedings ineffectual. When, after being rebuffed by this Court in *Warren* v. *Palmer*, 310 U.S. 132, the original B&P president and trustee (Mr. Warren) proposed a strong procedural program, Judge Ford in Boston turned it down in chambers, saying: "I don't want to get into a rat race with Judge Hincks." And when petitioner's counsel informed former Chief Judge Magruder of the First Circuit that the 1957 plan appeal was coming on, the latter replied, "Oh God, we don't want to hear that. I told Ford to get that damned thing off the docket."

The present Chief Judge inherits Judge Magruder's office. Given his early years in the eminent Boston firm of Choate Hall & Stewart, the New Haven's traditional reorganization lawyers (whose senior partner Mr. Garfield still seeks to complete his 1939 grand New Haven plan herein) the present Chief Judge can appreciate that the situation has become a judicial quagmire. As district judge in 1955 he refused to instruct the B&P to join as co-appellant to the Supreme Court in the B&P 1955 appeal (*supra*, note 6).

6. The development of November 6, 1967

On November 6 the I.C.C. issued an order refusing to wait for the Supreme Court to pass on these petitions, and re-

fusing to let petitioner's September amendments be considered,[12] before the plan for immediate sale to New Haven shall be submitted to the vote of the stockholders. Clearly the plan does not deserve its judicial certifications to the stockholders. Petitioner is informed that an I.C.C. employee has now telephoned instructions to the B&P trustee to conduct the vote immediately for stockholders of November 9, 1967.

Conclusion

It is no wonder that the proposed title of a projected book on the judicial degradation of B&P is "How to Railroad a Railroad".

Respectfully submitted,

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November 7, 1967

[12] New Haven's brief herein condemns such consideration as "premature". Since 1954 New Haven pleadings have nearly always seen petitioner's rescue work for B&P as premature or too late, or brought in the wrong forum.

APPENDIX D

Petitioner's dealings with the Clerk's office

The first *per curiam* memorandum of March 29 errs in finding that petitioner was not led to believe certain things by the clerk's office, and in rebuking petitioner for reliance on the printer. (Mandamus petition pp. 1a, 2a.) This is what happened.

1. Blanchard Press, Inc., was engaged as petitioner's printer on the recommendation of the Deputy Clerk of the Court of Appeals in Boston, who recommended it as the court's own contract printer and as being knowledgeable about the court's printing requirements.

The printer's knowledgeability was needed, because petitioner's general counsel (who handled the matter) has resided in Washington since 1941 (only maintaining a Boston office specially for B&P affairs) and because the practice of the First Circuit proved to be stricter than in the D.C. Circuit, and rather abstruse. The Clerk has served 40 years and is the procedural *eminence grise* of the Boston federal court house. The Deputy Clerk is also experienced and learned. Being less active than the other circuits the Clerk's office in the First Circuit is in a better position to weave the niceties.

2. Petitioner of course appealed under Civil Rule 73 (b), which allowed 60 days for the notice of appeal.[1] *Petitioner accelerated the appeal by a full month.* If petitioner had used all the time allowed, the perfected appeal

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[1] The Kynett Committee's denial of this is not to be taken seriously. The B&P source manual (the existing printed Record Appendix, volume II, pages 847a and 848a) shows that its counsel's late senior partner filed an appeal in this case in 1956 under Rule 73(b). The B&P Corporation's appeal was entitled "Notice of Appeal to Court of Appeals under Rule 73(b)". The Civil Rule governs. This is not a bankruptcy proceeding, but reorganization in equity using some procedures of the Emergency Railroad Transportation Act of 1933. Those procedures got inserted into the United States Code under Title 11, Bankruptcy, *faute de mieux.*

would have come on for oral argument properly in the June sitting without difficulty. Petitioner accelerated the appeal in order to get the record "upstairs" in the appellate clerk's office where it could be worked on effectively in a workroom. Unlike other railroad reorganizations, the B&P record is not printed currently by the district court or the estate, and after 29 years it has become a sprawling mass in the filing cabinets of the district court clerk's office, a bustling place where counsel may no longer work on files behind the counter. Petitioner followed the efficient procedure worked out last time to get the B&P files moved upstairs as soon as possible. Petitioner followed the routine of the first appeals by *then* moving for a month's extension to perfect the appeal — in the Court of Appeals. (Had delay been obtained in the District Court, its busy office would not have assembled and transmitted the record upstairs to be dealt with in the workroom.)

Although the Court of Appeals under Chief Judge Magruder had granted the month's extension last time as a matter of course, the Court now denied it, by an order signed by the Clerk.

3. The court rules only allowed petitioner five days to work on the record before designating. A large part of the record was not sent up. It was discovered that the exhibits in the I.C.C. hearings of 1964 and 1965 were missing, apparently never having left Washington. The seven transcripts of those hearings were not located until some time afterward. Under all the circumstances designation by February 22 was impossible.

Petitioner presented the predicament in the workroom to the Clerk, who explained that (1) the month's extension was denied because it would have postponed the oral argument from the May sitting to the June sitting; (2) the court was flexible about extensions which would not postpone the oral argument; (3) the designations were not

filed in the record, but were only *furnished* to appellees to guide them in selecting their own future submissions; (4) no appeal has ever been dismissed in the court for delay in appellant's designations; (5) the court would entertain a motion to extend the time within the framework allowed by the May sitting. Hence petitioner applied for and received an extension until March 10, and then "furnished" its designations of 204 items which petitioner "proposed to print".[2]

The distinction between filing and furnishing is one of the niceties. *Petitioner has never been jurisdictionally defective in any aspect of the appeal.*

4. Next came the printing and the brief. *Petitioner's 204 designations only covered new material not already printed in the existing Record Appendix,* which was printed for the first appeals and which for 10 years has formed the only Boston & Providence Railroad Reorganization source manual. The B&P stockholders printed Volumes I and II at expense exceeding $7,000, which has not been reimbursed.[3] The New Haven printed Volume III.

The major items for new printing were extracts from the I.C.C. plan hearings. As soon as they could be released by the three lawyers working on the compensation brief due March 20 (see mandamus petition, p. 15) counsel took them to the printer. (The Clerk's office would not release the original for printing.)

In a planning conference the printer advised the use of the old printed record, citing the recent example of the *Northeast Airlines* appeals where that was done in the First

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[2] The mandamus petition inadvertently says "filed" where it should have said "furnished". (Page 16, paragraph 3.)

[3] The B&P Corporation was co-appellant (then having different counsel) but did not contribute. The B&P trustee opposed the 1957 appeals with the New Haven (unlike the present situation). Reimbursement was requested in compensation petitions sent to the I.C.C. over a year ago. I.C.C. action is awaited.

Circuit. He named Monday, April 3, as his production date for the new record volume and the printed brief (containing the R.A. page citations).

5. Petitioner then consulted the Deputy Clerk, who confirmed the occasional practice of using the same record appendix for consecutive appeals, but said it should be covered by a formal request for permission. He also said that there must be a copy for each new judge and any new appellee. *Petitioner assured the Deputy Clerk that counsel had saved unused copies* printed for possible Supreme Court use in 1957 — enough for the three new judges and for the single new appellee.

6. Petitioner then drew a motion requesting permission (1) to use the existing Record Appendix, (2) to begin the new Volume IV with right-hand page 1215a; and (3) to file the new record volume and brief by April 3. Petitioner submitted the motion for the comment of the Deputy Clerk, who said that it was in order, but that it should be changed to accelerate the filing date from April 3 to Friday March 31, for this technical reason. If appellant should file on April 3, that would allow appellees until April 24 for their filing (under a 21-day rule) which would be only a week before the May sitting. He said that was not time enough. Petitioner said that it would be willing to waive a reply brief. The Deputy Clerk said that one week before the sitting (*i.e.*, Monday April 24) the Clerk would prepare the calendar of cases to be called May 1, and that the list would then be printed — and *the Clerk strongly disliked having to strike the name of a case off the list after it had been put on.*

He said that by filing March 31, petitioner would accelerate appellees' deadline to Friday April 21, so that by Monday it would be known whether the case should go on the calendar or whether appellees required an exten-

sion. *Petitioner said that it would gladly consent to any reasonable extension for appellees.*

Petitioner altered the April 3 date on the face of the motion to March 31 and filed it, notifying the printer, who accepted the new deadline.

7. After negotiations with the clerk's office extending over several days petitioner filed the motion on March 21. Three days are allowed for answers. The New Haven *apparat* answered by moving to dismiss the appeal for failure to file the printed record and brief by March 22. The motion characterized petitioner's behaviour reported above as "utter disregard for this Court". It also, with equal inaccuracy, accused petitioner of requesting to be relieved of reprinting certain parts of "the record said to have been printed in connection with a prior appeal in this matter".[4]

8. On Good Friday afternoon, March 24, the court issued an order signed by the Clerk (1) rejecting the existing Record Appendix, (2) refusing to allow page continuity, (3) refusing any extension of time.

However, the Court's order did not dismiss the appeal.

9. Petitioner and the printer attacked the new burden of reprinting.

One technical problem was that, by forbidding the new volume to begin with page 1215a, the court made it impossible to reduce the new material (which was largely typeset) to pages. It could not begin with *any* page number, because the old material for reprinting must go in first.

---

[4] Appellees realized that the designations were limited to items placed in the record after the old printing. In addition to those 204 designations, petitioner alluded to some unspecified lease clauses, planning to reprint those with argumentative editing — as was indeed done. See Appendix C, page B-1 ff. That did not displace the basic printing of all three leases, Exhibits 6, 7, 39, which were already printed. All three appellees participated in the old printing.

Petitioner was limited in the amount of old material that it could reprint by financial stringency. Already expenses for 1967 had exceeded $6,500, including $2,300 for the transcript of the compensation hearing in January. The printing estimate called for another $2,500. The reprinting would increase that. Petitioner perforce selected less than the fair minimum for reprinting.

10. The court left the dismissal question open. Petitioner and the printer strove to complete the printing and filing before the court should act. On the morning of March 29 the printer called on the Clerk and privately informed him that with the added material the March 31 deadline was impossible. The Clerk conferred with the Chief Judge, and that afternoon the Memorandum and dismissal were issued. Reconsideration was denied on April 18.

11. No judge of the court ever granted petitioner a hearing or conference. Otherwise petitioner does not believe that the summary dismissal would have occurred.

12. The Clerk discussed the matter with petitioner's counsel after each denial. He explained considerations which seemed to him to justify the disposition taken. He said that it was improper to ask an appellate court to extend time so that counsel could complete briefs for an inferior body, the I.C.C. He said if appellant's counsel could not meet the deadlines he should engage additional counsel rather than seeking extensions. He said that the judges ought not to be burdened with an old Record Appendix, because it included a lot of material that would not actually be used. He said that if petitioner had asked him, he would have allowed petitioner to distribute temporary typewritten copies of the brief and appendix. (That, however, would be as difficult as printing.) On the other hand he admitted that if April had 31 days

the dilemma would not arise, because the May calendar would be called a week later.

13. Immediately upon receiving the dismissal petitioner stopped the R.A. printing. Petitioner tendered the brief without R.A. citations. Petitioner paid the printer's bill for $1,345.52 for the abortive job.

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Supreme Court of the United States

OCTOBER TERM, 1967

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,

v.

CHARLES W. BASSETT, TRUSTEE, ET AL.,
Respondents.

BOSTON & PROVIDENCE RAILROAD STOCKHOLDERS DEVELOPMENT GROUP,
Petitioner,

v.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT AND ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS WITH PETITION ANNEXED

SECOND REPLY BRIEF

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November 29, 1967

Statler Press, Inc., Boston, Mass. — KI 6-0100

SECOND REPLY BRIEF

1. The concert of opposition against petitioner's motion to stay the forced vote on the plan demonstrates the efficiency of the New Haven's *claque*. Given the opposition of the office of the Solicitor General, we would not expect that Mr. Justice Fortas or Mr. Justice Black would stay the vote. Yet the forcing of this vote seems a unique departure from Commission practice, which has hitherto respected judicial review proceedings. The ballots went out November 17. Relief has become more imperative.

2. The Solicitor General dissociated himself from the opposition, on the ground that he formerly represented the B&P trusteeship in appellate proceedings. See *Warren* v. *Palmer,* 310 U.S. 132. Mr. Griswold has personal knowledge and insight into the judicial deprivation of B&P, and it is ironic and unfortunate that he should stay his hand now. He would not have put the United States under a contract sanctified by New Haven Court Order 347 to support New Haven's claim on the false debentures against B&P. Yet that is exactly what happened. See Appendix C to the mandamus petition, page 29, paragraph 5, beginning . . .

> "5. Perhaps the New Haven's most effective ploy has been to bring into alignment the Department of Justice as a special ally against B&P. The debentures have been cleverly twisted into a sort of federal paper tiger. . . ."

3. On November 8, 1967, the First Circuit, with opinion by Chief Justice Aldrich, reversed the District Court in favor of the Commonwealth of Massachusetts, by holding that the Commonwealth may take the B&P main-line section north of Readville without going through the reorganiza-

tion court. On that basis the Commonwealth is preparing to commence takings of adjacent land for Interstate Highway 95 before the end of this year and is eager to get the B&P line, according to the plan originated by petitioner. The New Haven obtained the district court order blocking the Commonwealth, which Chief Judge Aldrich has now reversed. It has now obtained the vote of the stockholders (with the ballots to be counted on December 18) as another roadblock. Its purpose is to force transfer of title into the New Haven before the Commonwealth can acquire it from B&P. If the Commonwealth gets there first, then it will pay B&P. If New Haven gets there first, then the Commonwealth will pay the New Haven. If the funds get into the B&P treasury, it would be possible to extricate B&P from bankruptcy as no longer insolvent. If the funds get into the New Haven treasury, it will be because the plan is forced through. Under the fine type of its CCBI clause, New Haven will deduct an amount which it estimates as $7,400,000 to pay for grandiose construction on the parallel Midland Route — for the benefit of Penn-Central. This case has reached the stage of a TV Western climax.

4. This month has produced another major appellate reversal. The Commission's plan valuation of B&P's properties was based on a 1964 statement of the New Haven's general real estate agent estimating their total scrap value (or liquidating value) as $9,500,000. (See Appendix C, page 22.) However, in the *Hudson Tubes* case, the New York Court of Appeals now repudiates scrap value as the measure of just compensation for deficit-ridden railroad properties. The Appellate Division had awarded "virtually nothing" for the tunnel property, "since the property would in liquidation bring at most a nominal sum, if that." (Mimeo sheet 5) The Court of Appeals increased that to $30,000,000, finding scrap value repugnant, no matter how great the deficits.

> "Considering all these factors, we believe that the award of $30,000,000 made by Special Term and predicated on the conclusion that the condemnees should at least be repaid for the depreciated original cost of the tunnels is fair and just and that an award either considerably above or below that figure would be "manifestly unjust" to the owner whose property is taken and the people who must pay the bill." (Mimeo Sheet 9)
>
> *Hudson Rapid Tubes Corporation* v. *Port Authority Trans-Hudson Corporation.*
> N. Y. Court of Appeals, No. 100 (1967)

If this were a federal decision it would make a conflict of the circuits necessitating Supreme Court review. Yet it is a decision repudiating the scrap value test for just compensation for an interstate railroad taken by condemnation. Sales through plans of reorganization under Section 77 are deemed to be forced by operation of federal law, granting the owners the right to just compensation. This decision has been injected by New Haven bondholders into the parallel pending Penn-Central merger proceeding, the part on which hearing commences before the I.C.C. on November 29, 1967 (today) which is aimed at determining fair terms for sale of the New Haven properties, *and resale of the B&P properties,* to Penn-Central, through a plan of reorganization for the New Haven R.R. Company under Section 77. (I.C.C. F.D. 21,669, 21,989.)

This Court can now provide valuable guidance by granting certiorari or mandamus herein in light of the new decision.

5. *Chief Judge Aldrich's letter* of November 14 to the Chief Justice is illuminating. A copy is appended as Petitioner's Appendix E. Responding to page 7 of Petitioner's Reply Brief, he points out that, although the rules do not

show it, the clerk has been instructed to tell an attorney who complains that his client cannot pay the printing costs that he may file a motion for permission to dispense with printing.

It happens that Chief Judge Aldrich, being a neighbor of one member of the Development Group, and having attended boarding school with two other members, would realize that they do not qualify personally for such relief. The problem herein was the impossibility of reprinting with no time.

His letter, however, would seem to indicate that the imposition of the requirement of reprinting really was a big departure from the intended practice of the court, justifying the relief now sought. In trying to reconcile his harsh memoranda, especially the first (Appendix A), with the proceedings in the clerk's office described in the dreary Appendix D to our first Reply Brief, it becomes impossible to escape the conclusion that the entire imbroglio was caused by inadequate communication in the court house, perhaps between the Deputy Clerk and the Clerk, perhaps between the Clerk and the Chief Judge, certainly between the Chief Judge and Petitioner.

In citing Chief Judge Aldrich's letter of November 14 and his reversal of November 8 against the New Haven, petitioner desires to emphasize Judge Aldrich's renowned judicial ability and independence. In alluding to him earlier, petitioner did not intend any contrary implication. Indeed, petitioner has confidence that Judge Aldrich will reverse the district court, if the Supreme Court will instruct that the appeal be heard. Petitioner only intended to show that the present Chief Judge has become the presiding heir of a long informal policy of judicial avoidance which has made the B&P litigation a quagmire. Forcing of the vote for the plan, assuming a vote of acceptance (for the peculiar reasons set forth in petitioner's motion of November 16 to

stay the vote) will almost certainly have the effect of hardening the judicial attitude against going into the merits.

6. In lamenting the judicial degradation of B&P (which petitioner offers to document fully in a further brief) petitioner has spoken only out of veneration for the judicial institution and distress that this litigation has gone so badly awry. The forcing of the vote forecasts more trouble. Even though the Old Colony bondholders, in the first New Haven reorganization, had voted against the plan, the New Haven induced the district court to set aside their rejection, approve the plan, and order consumation of New Haven's acquisition of the Old Colony lines. While review proceedings were pending in this Court they went ahead and exchanged securities.

Conclusion

It is most urgent that this Court now instruct the Court of Appeals to hear petitioner's appeal.

Respectfully submitted,

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November 29, 1967

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BAILEY ALDRICH
Chief Judge

BOSTON, MASS. 02109

November 14, 1967

The Honorable Earl Warren
Chief Justice of the United States
Supreme Court of the United States
Washington, D.C. 20543

My dear Mr. Chief Justice:

Re: Boston & Providence Railroad
Stockholders Development Group
v. United States Court of Appeals
for the First Circuit, et al.
Misc. No. 661.

Petitioner's counsel have favored me, as a respondent in the above entitled matter, with a copy of their reply brief. Since I consider myself only technically a respondent I do not regard it appropriate to reply to any statements therein (or in the earlier papers) insofar as they relate specifically to this case. Insofar as they relate to our practice, however, notably the alleged cost of litigation expense in this circuit, Reply Brief p. 7, for many years we have made use of our local Rule 20 to permit reproduced copies, four in number, rather than printing. While a technical reading of our Rule 17 might suggest that Rule 20 is limited to strictly *in forma pauperis* proceedings, our clerk's office is instructed to tell any counsel who seeks relief because his client cannot afford to print a record or brief to file a motion to proceed

under Rule 20. We grant such motions frequently, and have done so even in a reorganization proceeding.

So far as I know the question never came up in the case at bar, and I mention the subject only so that you will not receive an erroneous impression of our general practice.

Respectfully,

BAILEY ALDRICH
Chief Judge

cc Mr. Justice Fortas
To all counsel.